COPYRIGHT LAW REVISION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

H.R. 2223

COPYRIGHT LAW REVISION

MAY 7, 8, 14, 15; JUNE 3, 5, 11, 12; JULY 10, 17, 23; SEPTEMBER 11, 18; OCTOBER 9, 30; NOVEMBER 6, 20; AND DECEMBER 4, 1975

Serial No. 36

Part 3



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

15%

57-786 O

WASHINGTON: 1976

33 4521 - **B**4

COMMITTEÉ ON THE JUDICIARY

PETER W. RODINO, JR., New Jersey, Chairman

JACK BROOKS, Texas ROBERT W. KASTENMELER, Wisconsin DON EDWARDS, California WILLIAM L. HUNGATE, Missouri JOHN CONYERS, Jr., Michigan JOSHUA EILBERG, Lennsylvania WALTER FLOWERS, Alabama JAMES R. MANN, South Carolina PAUL S. SAKBANES, Maryland JOHN F. SEIBERLING, Ohio GEORGE L. VANIELSON, California. ROBERT F. DRINAN, Massachusetts BARBARA JÖRDAN, Texas RAY THORNTON, Arkansas ELIZABETH HOLTZMAN, New York EDWARD MEZVINSKY, Iowa HERMAN BADILLO, New York ROMANO L. MAZZOLI, Kentucky EDWARD W. PATTISON, New York CHRISTOPHER J. DODD, Connecticut WILLIAM J. HUGHES, New Jersey

EDWARD HUTCHINSON, Michigan ROBERT McCLORY, Illinois TOM RAILSBACK, Illinois CHARLES E. WIGGINS, California HAMILTON FISH, JR., New York M. CALDWELL BUTLER, Virginia WILLIAM S. COHEN, Maine CARLOS J. MOORHEAD, California JOHN M. ASHBROOK, Ohio HENRY J. HYDE, Illinois THOMAS N. KINDNESS, Ohio

MARTIN A. RUSSO, Illinois EARL C. DUDLEY, Jr., General Counsel GARNER J. CLINE, Staff Director HERBERT FUCHS, Counsel" WILLIAM P. SHATTUCK, Counsel ALAN'A. PARKER, Counsel JAMES F. FALCO, Counsel MAURICE A. BARBOZA, Counsel THOMAS W. HUTCHISON, Counsel ARTHUR P. ENDRES, Jr., Counsel DANIEL L. COHEN, Counsel FRANKLIN G. POLK, Counsel THOMAS E. MOONEY, Counsel ALEXANDER B. COOK, Counsel COONSTANTINE J. GEKAS, Consel ALAN F. COFFEY, Jr., Counsel KENNETH N. KLEE, Counsel RAYMOND V. SMIETANKA, Counsel

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

ROBERT W. KASTENMETER, Wisconsin, Chairman

GEORGE E. DANIELSON, California ROBERT F. DRINAN, Massachusetts HERMAN BAD'LLO, New York EDWARD W. PATTISON, New York TOM RAILSBACK, Illinois CHARLES E. WIGGINS, California

HERBERT FUCHS, Counsel
BRUCE A. LEHMAN, Counsel
GAIL P. HIGGINS, Counsel
TIMOTHY A. BOGGS, Professional Staff Member
THOMAS E. MOONEY, Associate Counsel

CONTENTS

and the second of the second o	
Hearings held on-	P
May 7, 1975	
May 8, 1975	
May 14, 1975	
May 15, 1975	3
Tuno 2 1075	- {
June 3, 1975	
Tune 1, 1976	4
June 11, 1975	4
June 12, 1975	9
July 10, 1975	8
July 17, 1975	. 6
July 23, 1975	12
September 11, 1975	13
September 18, 1975	16
October 9, 1975	17
October 30, 1975	18
November 6, 1975	18
November 20, 1975	18
December 4 1075	19
December 4, 1975Text of—	19
H.R. 2223	
H.R. 2223	
H.R. 4965	
H.R. 5345	
S. 1361	8
Witnesses:	
Abrams, George, Alphabets, Inc.	10
Prepared statement	10
Prepared statement Aleinikoff, Eugene N., counsel to the Agency for Instructional Tele-	
vision and Other Educational Television Agencies	8
Prepared statement	8
Allen, Nicholas E., counsel, Music Operators of America	4
Barco, George J., general counsel, Pennsylvania Cable Television	
Association	6
Association	
Prepared statement Baumgarten, Jon, Macmillan, Inc., and Harcourt Brace and	6
Baumgarten, Jon, Macmillan, Inc., and Harcourt Brace and	_
JOVANOVICA	9
Bender, Ivan R., on behalf of the Educational Media Producers	_
Council	9
Prepared statement	
Bikel, Theodore, president, Actors Equity Association	12
Prenared statement	13
Biller Joel W Secretary for Commercial Affairs and Business	-,-
Activities Department of State	1
Biller, Joel W., Secretary for Commercial Affairs and Business Activities, Department of State Binns, J. Warren, Jr., administrator of Instructional Television &	*
Padio and Educational Product Discontinuous relevision of	.8
Radio and Educational Products Dissemination	
Prepared statement	8
Blake, Eubie, American Guild of Authors and Composers	16
Bradley, Rex A., chairman, National Cable Television Association.	4
Prepared statement	5
Bresnan, William J., president, Cable Television Division of Tele-	
prompter Corp	6
Prepared statement	6
Prepared statement Brylawski, E. Fulton, chairman, Copyright Committee, Bar Associa-	•
tion of the District of Columbia.	4
Despend statement	4
Prepared statement	*

Witnesses—Continued	Page
Cairns, Robert W., executive director, American Chemical Society	229
Prepared statementCameron, Prof. Rondo, author	231 467
Prepared statementChapin, Edward W., counsel, Broadcast Music, Inc	473
Chapin, Edward W., counsel, Broadcast Music, Inc.	907
Prepared statement 398,	1738 1738
Ciancimino, Albert F., counsel, SESAC, Inc	1700
Television	859
Prepared statement	880
of Recording Merchandisers, Inc.	1571
Prepared statementCollins, Fred, Jr., president, Music Operators of America	1577
Cooper, Edward, vice president, Motion Picture Association of	Ą
America	1731
Cooper, Robert, executive secretary, Community Antenna Television	
Association	613
Prepared statementCopland, Aaron, composer	624 374
Prepared statement	377
Coppedge, John O., chairman, National Collegiate Athletic Associa-	
tion, Cable Television Association, Cable Television Association Subcommittee	820
Prenared statement	817
Cornils, Wayne, chairman, Small Market Radio Committee, National	
Association of BroadcastersCramer, Edward M., president, Broadcast Music, Inc	1366 907
Davis, Louis F. (Chip), composer	396
Prenared statement	395
Dew, Walter, Advertising Typographers Association	1142 1212
Prepared statement Ebenstein, Daniel, on behalf of Leonard Storch Enterprises, Inc.	1142
Prepared statement	
Prepared statement Evans, Robert V., vice president and general counsel, CBS, Inc. 68 Prepared statement	1, 765
Prepared statement 68: armer, Ernest R., president, Shawnee Press, Inc., Delaware Water	5, 754
Gap, Pa	344
Prepared statement. Feist, Leonard, executive vice president, National Music Publishers	342
Association	1579
Fitzpatrick, James, general counsel, Recording Industry Association	
of America	1393
Ford, Frederick W., counsel, Ad Hoc Committee of Concerned Cable Television Operators for a Fair Copyright Law	627
Prepared statement.	636
Prepared statementFreitag, Bernard J., teacher, Council Rock High School, New Town,	080
Gastel, Joseph, copyright attorney	276 1014
Prepared statement.	1019
Prepared statement Glover, John D., director, Cambridge Research Institute	1401
Prepared statement	1402
Department of Justice	127
Prepared statement. Golodner, Jack, executive secretary, Council of AFL-CIO Unions for	149
Golodner, Jack, executive secretary, Council of AFL-CIC Unions for	1298
Professional Employees Gortikov, Stanley, president, Recording Industry Association of	
America, Inc	1392
Prepared statement 1304,	1394
America	1238
America Prepared statement	1279
Hamlisch, Marvin, American Guild of Authors and Composers	1646

Witnesses—Continued	_
Hardy, Ashton R., General Counsel, Federal Communications Commission	Page 433
Prepared statement	444
Heilman, David, EC Tape Service————————————————————————————————————	1238 1298
Prepared statement	1339
Prepared statement Hitchens, Howard B., executive director, Association for Educational Communications & Technology	•
Communications & Technology	288 279
Prepared statement	418
	810
Hogan, Robert F. executive secretary, National Council of Teachers	812
of English	292
Prepared statement Hogan, Robert F., executive secretary, National Council of Teachers of English Prepared statement Holmes, Lee, president, GuamCable TV Co Prepared statement	290
Prepared statement	1717
Prepared statement Hoopes, Townsend, president, Association of American Publishers Prepared statement 238, Howard, William K., president, Hollywood Film Council	237
Prepared statement 238,	1702
Prepared statement	698
Prepared statement Kaminstein, Abraham L., former Register of Copyrights, Library of	01
Congress Kapp, Michael, president, Warner Special Products	91 1570
Karp, Irwin, counsel for the Authors League of America, Inc.	216.
354, 907, Propaged statement 220, 348, 910, 1705	1704
Prepared statement 220, 348, 910, 1705, Keller, Thomas J., Acting General Counsel, Office of Telecommuni-	1704
cations Policy, Executive Office of the President	447
Prepared statement Kiser, David B., associate, Cambridge Research Institute	457 1491
Korman, Bernaid, general counsel, American Society of Composers,	1451
Korman, Bernaid, general counsel, American Society of Composers, Authors & Publishers	, 907
Association of Broadcasters	1366
Kuhn, Bowie, Commissioner of Baseball	794
Latman Alan attorney International Typographic Composition	785
V920019MOH = ==================================	991
Prepared statement	1004
Leeds, Henry, counsel, Mergenthaler CorpLieb, Charles H., counsel for the Association of American Publishers	1014 225
Prepared statement	226
Linden, Bella L., representing educational publishersPrepared statement	313
Lorenz, John G., Acting Librarian of Congress, Library of Congress	91
Low, Edmon, representative of six library associations	184
Prepared statement Mawdsley, Russell, chairman, Legislative Committee, Music Operators	199
of America	421
Prepared statement	418 330
Prepared statement	316
Prepared statement Merry, Donald D., president, Sicom Electronics Corp	474
Prepared statement	479 759
Mulliken, Charles, International Typographic Association	1142
Prepared statement	1212
Nathan Associates	1580
Oliver, Sy, composer	396
Prepared statement	391 391
Corp	1.14
Prepared statement Patterson, Perry S., counsel, Rock-Ola Manufacturing Corp	1036 411
Prepared statement	413

Witnesses—Continue	
Peer, Ralph, via president, Peer-Southern Organization; director, National Music Publishers Association Quayle, Donald 12., senior vice president for broadcasting, Corpora-	Page
National Research Publishers Association	1645
Arianda Dane is a capitar vine president for broadcasting Corners	TOŽO.
tion for Bublic Bundangting	859
tion for Public Broadcasting Prepared statement	863
Prepared statement Raskind, Leo J., representing the Association of American Law	000 ,
Raskind, Leo J., representing the Association of American Law	
Schools, the American Association of University Professors, and the	~=~
American Council on Education	272
Prepared statement	269
Ringer, Barbara, Register of Copyrights, Library of Congress	91,
1779, 1807, 1865,	
Prepared statement Rockwell, Dr. Margaret, Washington Ear Sandler, Jack B., chairman, Government Relations Committee of	95
Rockwell, Dr. Margaret, Washington Ear	1757
Sandler, Jack B., chairman, Government Relations Committee of	
the Book Manufacturers Institute, Inc	1695
Dran and atatament	1697
Sheppard, Dr. Walter, representing the Association of Public Radio	
Sheppard, Dr. Walter, representing the Association of Public Radio Stations Simon, Gerald A., managing director, Cambridge Research Institute	1757
Simon, Gerald A., managing director, Cambridge Research Institute	1401
Simpson, Paul C., Nashville, Tenn	693
Simpson, Paul C., Nashville, TennPrepared statement	690
Smith, Eric H. associate general counsel, Public Broadcasting	
Service	859
Service Prepared.stagement	865
Steinbach, Shelder E., staff counsel, American Council on Education	268
Strackbein, O. R., representing International Allied Printing Trades	_00
Association	1663
Association Prepared statisment Summers, John B., general counsel, National Association of Broad-	1666
Summore John III general council National Association of Broad	1000
Casters	777
Prepared statement	774
Tegtmeyer, Rene D., Assistant Commissioner for Patents, Depart-	***
ment of Commerce.	163
Prepared statement	159
Valenti, Jack, president, Motion Picture Association of America, Inc.,	100
valenti, Jack, presidenti, Motion Lieture Association of America, Inc.,	704
Opening distributed 10 Motion 110 and 2 Leavision 110 ductes, inc	1731
and the Association of Motion Picture & Television Producers, Inc. Prepared statement 705, 761 Van Arkel, Gerard, general counsel, International Typographical	, 1701
van Arkei, Gerard, general counsel, International Typographical	1694
Union	
Prepared statement	1668 1238
wany, I. Aid , president, Record & Tape Association of America	1250
Prepared statement	1201
Wasilewski, Vincent T., president, National Association of Broad-	1000
casters.	1366
Prepared statement	1363
Wasserstrom, Alfred H., copyright attorney	1142
Prepared statement	1217
Wicks, David O., Jr., Becker Communications Associates	598
Prepared statement	607
Wolff, I. Sanford, the American Federation of Musicians (AFL-CIO),	
and the American Federation of Television and Radio Artists	1000
(AFL-CIO)	1298
Prepared statement	1298
Won Pat, Hon. Antonio Borja, a Representative in Congress from	
the Territory of Guam	.1717
Zimmerman, Thomas F., first vice president, National Religious	
Broadcasters, Inc.	1743
Prepared statementZurkowski, Paul G., president, Information Industry Association	1745
Zurkowski, Paul G., president, Information Industry Association	340
Prepared statement	332

CA #4040	
Additional insterial—	Päge
	• *
television stations and the sale of advertising time to advertisers	743
Allen, Joseph P., Assistant Administrator for Legislative Affairs,	
National Aeronautics and Space Administration, letter dated	
September 5, 1975, to Hon. Peter W. Rodino, Jr., chairman, House	inc
Committée on the Judiciary	178
American Broadcasting Companies, inc., prepared statement.	$\begin{array}{c} 827 \\ 252 \end{array}$
American Business Press, Inc., prepared statement	202
Dublishme Acquisition is interested to the National Music	1641
Publishers Association, joint statement 1586, American Society of Composers, Authors, and Publishers, prepared	1021
statement 925,	047
Biemiller, Andrew, director, Legislative Department, AFL-CIO, letter	, 0%
dated July 22, 1975, to Hön. Robert W. Kastenmeier	1335
Bresnan, William J., president, Cable Division, Teleprompter Corp.	849
Broadcast Music, Inc., prepared statement 389, 962.	965
Breadcast Music, Inc., prepared statement389, 962, Burns, Aaron, president, International Typeface Corp., letter dated	•••
July 28, 1975, to Hon. Robert W. Kastenmeier	1020
"Cable Television Under the 1972 Rules and the Impact of Alternative	
Copyright Fee Proposals," by Bridger M. Mitchell.	517
Cairns, Robert W., American Chemical Society, letter dated June 25,	
1975, to Hon. Robert W. Kastenmeier	243
"Copyrightability of Typeface and Type Font Design," statement of	
position, Castcraft Industries, Inc.	1228
Coyle, Maurice J., M.D., Department of Radiology, Providence Hos-	
pital, Anchorage, Alaska, letter dated July 9, 1975, to Hon. Peter W.	
Rodino, Jr	215
Davis, Hal C., president, American Federation of Musicians letter	1000
dated July 8, 1975, to Hon. Robert W. Kastenmeier	1658
Ebenstein, Daniel, Amster and Rothstein, counselors at law, letter	1104
dated July 18, 1975, to Hon. Robert W. Kastenmeier Evans, Robert V., vice president, CBS, letter dated July 3, 1975, to	1194
Evans, Robert V., vice president, Obs, letter dated July 3, 1975, to	
Hon. Robert W. Kastenmeier, chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice	689
Feist, Leonard, National Music Publishers' Association, Inc., letter	003
	1651
Finn, James B., Ph. D., senior vice president, research and develop-	.001
ment, the C. V. Mosby Co., letter dated August 8, 1975, to Dr.	
Ray Alan Woodriff	265
General license agreement, restaurants, taverns, nightclubs, and simi-	
lar establishments	385
Harris, James A., president, National Education Association, pre-	
pared statement	274
Hightower, John B., chairman, Advocate for the Arts/Association	
Councils for the Arts, prepared statement	263
Ivy, Emma G., R.N., Wrangell General Hospital, Wrangell, Alaska, letter dated July 22, 1975, to Hon. Don Young.	015
letter dated July 22, 1975, to Hon. Don Young	215
Keaney, Kevin J., general counsel, Federal Librarians Association,	080
prepared statement King, Frank Peewee, composer, prepared statement	262 394
Korman Raynard control counsel American Scripts of Company	OUT
Korman, Bernard, general counsel, American Scciety of Composers, Authors, and Publishers, letter dated August 6, 1975, to Hon.	
Robert W. Kastenmeier	383
Lindow, Lester W., executive director, Association of Maximum	050
Service Telecasters, prepared statement	845
Lorenz, John G., Acting Librarian of Congress, letter dated August	
26, 1975, to Hon. Peter W. Rodino, Jr., chairman, House Com-	
mittee on the Judiciary	174
McCloskey, Robert J., Assistant Secretary for Congressional Rela-	
tions, Department of State, letter dated May 7, 1975, to Hon. Peter	
W. Ilodino, Jr., chairman, House Committee on the Judiciary	172
McKenna, Frank, executive director, Special Libraries Association,	
prepared statement	209
Marke, Julius J., American Association of Law Librarics, prepared	/ L PM A
statement	254

Additional material—Continued	
Marshall, Nancy H., director, Wisconsin Interlibrary Loan Service, Madison, Wis., letter dated May 6, 1975, to Hon. Robert W. Kastenmeier	Page 215
Mathews, Hon. David, Secretary, Department of Health, Education,	
and Welfare, prepared statement	261
Mergenthaler Linotype Co., prepared statement	381 1054
Nathan, Robert R., president, Robert R. Nathan Associates, Inc.,	1004
letter dated October 24, 1975, to Hon. Robert W. Kastenmeier	1640
National Broadcasting Co., Inc., prepared statement825,	
National Music Publishers Association and American Guild of Authors	1000
& Composers, prepared statement	920
Nimmer, Prof. Melville B., professor of law, UCLA School of Law,	0_0
prepared statement	1038
Norwood, Frank W., executive secretary, Joint Council on Educational	
Telecommunications, letter dated July 10, 1975, to Hon. Robert W.	
Kastenmeier	883
Parker, Michael, director, Typographical Development Mergenthaler	
Linotype Co., letter dated July 28, 1975, to Hon. Robert W.	
Kastenmeier	1041
Passano, William M., chairman of the board, Williams & Wilkins Co.,	
prepared statement	260
Rayin, Mona (R.N.), instructor coordinator of R.N. Programs and	
Outreach, letter dated August 12, 1975, to Hon. Don Young	214
"Registration of Original Typeface Designs: Extension of Comment	1017
Period," vol., No. 223, Federal Register, November 18, 1975	1017
"Registration of Original Typeface Designs," vol. 39, No. 176, Federal	1016
Register, September 10, 1974.	1016
Ringer, Barbara, Register of Copyrights, letter dated June 6, 1975, to	1008
Hon. Robert W. Kastenmeier	7000
statement	813
Schrader, Dorothy M., General Counsel, Copyright Office, prepared	010
statement	1015
Stevens, Hon. Ted, a U.S. Senator From the State of Alaska, letter	1010
dated October 8, 1975, to Hon. Robert W. Kastenmeier	1659
Steuermann, Clara, president, Music Library Association, prepared	
statement	207
"The Great American Rip-Off," by Mike Terranova, a pamphlet published by the Independent Record and Tape Association of	
published by the Independent Record and Tape Association of	
America	1265
Times Mirror, prepared statement	852
"Typeface Design Protection," statement of position of the American	1000
Institute of Graphic Arts.	1226
Valenti, Ja k, president, Motion Picture Association of America, Inc.,	
letters to Hon. Robert W. Kastenmeier— September 10, 1975————————————————————————————————————	1724
November 7 1075	1736
November 7, 1975 Vanantwerpen, F. J., president, Council of Engineering and Scientific	1.00
Society Executives, prepared statement	369
Wally, Alan I., president, Record and Tape Association of America.	
letter dated July 22, 1975, to Hon. Robert W. Kastenmeier	1263
- Warren, Albert, chairman, Copyright Committee, Independent News-	
letter Association, prepared statement	367
Wigron, Harold E., National Education Associations.	276
Woodriff, Dr. Ray, Department of Chemistry, Montana State Univer-	
sity, prepared statement	265
Young, Hon. Don, a Representative in Congress From the State of	
Alaska, letter dated October 2, 1975, to Hon. Robert W.	214
Kastenmeier	Ø14
Appendixes—— Appendix 1 Telepresenter Corp. memorandura on Constitutionality	
Appendix 1.—Teleprompter Corp. memorandum on Constitutionality of Proposed Copyright Legislation (H.R. 2223)	1917
Appendix 2.—18 briefing papers submitted by the Copyright Office.	2051
Appendix 2.—18 briefing papers submitted by the copyright concern Appendix 3.—Report of Working Group of Conference on Resolution	
of Copyright Issues (dealing with library photocopying)	2092
Appendix 4.—Miscellaneous communications	2124
LIE LANGUE DE DISCOLARISMANTA ASSURPE MINISTER MANDE MANDE MANDE DE LA CONTRACTION DEL CONTRACTION DE LA CONTRACTION DEL CONTRACTION DE LA	

COPYRIGHT LAW REVISION

THURSDAY, SEPTEMBER 11, 1975

House of Representatives. SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C. The subcommittee met, pursuant to recess, at 10:07 a.m., in room 2226, Rayburn House Office Building, Hon. George E. Danielson presiding,

Present: Representatives Danielson, Drinan, Pattison and Wiggins. Also present: Herbert Fuchs, counsel; and Thomas E. Mooney, associate counsel.

Mr. Danielson. The hour of 10 c'clock having arrived, the subcommittee will be in order.

I apologize, first of all, for being 7 minutes late here. I am a member of the whip organization, and we meet on Thursday mornings, and it is hard to get here much earlier.

Today we are meeting once more on the copyright law revision bills. Today's hearing will relate principally to section 115 of H.R. 2223. It involves a proposed increase in the mechanical royalty rate under the compulsory license for making and distribution of phonorecords of copyrighted music.

Section 1(e) of the existing copyright law provides a statutory royalty of 2 cents per tune per record. The pending revision bill, H.R. 2223, increases this figure to 3 cents per record, as provided in the Senate bills S. 1361 in the 93d Congress and S. 22.

Understandably, record companies oppose the recommended increase, and music publishers defend it. Both sides have enlisted the help of economic consultants from whom we will hear.

Our first witness today is Mr. Stanley M. Gortikov, president of the Recording Industry Association of America, Inc., accompanied by James F. Fitzpatrick, Esq.

Mssrs. Gortikov and Fitzpatrick are at the witness table. They have been allowed 10 minutes.

Would you please proceed?

D

TESTIMONY OF STANLEY M. GORTIKOV, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., ACCOMPANIED BY JAMES F, FITZPATRICK

Mr. Gorrikov. Mr. Chairman, I have a comprehensive written statement, which I will enter into the record. I will now summarize it. Mr. Dangelson. Without objection, the statement will be entered. It is not this one?

Mr. Gorrikov. No, sir, it is another one.

Mr. Danielson. All right. It will be entered in the record, without objection, and would you please summarize?

[The prepared statement of Stanley M. Gortikov follows:]

STATEMENT OF STANLEY M. GORTIKOV, PRESIDENT, RECORDING INDUSTEY ASSOCIATION OF AMERICA, INC.

INTRODUCTION

My name is Stanley Gortikov. I am president of the Recording Industry Association of America. Our member companies create and market about 85% of the recorded music sold in the United States. I have firsthand knowledge of the commercial and creative aspects of the recording industry, having previously served as president of Capitol Records, a major recording company.

THE PROPOSED CHANGE IS EXCESSIVE

We strongly object to the proposed "Mechanical Royalty" rate increase in Section 115. The "Mechanical Royalty" is the amount a music publishing company can charge a recording company for use of a composer's tune in a sound recording.

Section 115 proposes a statutory increase in the mechanical royalty from 2¢ to 5¢. This increase is glossed over as "only a penny" increase. However, that seemingly innocuous "penny" involves added payments of about \$47 million per year to the music publishing industry, an increase of 59%.

year to the music publishing industry, an increase of 59%.

The \$47 million "penny" payment is the biggest money issue in this bill and the major commercial and consumer question before this Committee. It is:

More than 11 times greater than the \$4.0 million annual payment by jukeboxes provided for in Section 116.

More than 7 times greater than cable television's hotly-contested payments to broadcasters of \$6.7 million per year.

Almost 5 times greater than the estimated \$10 million for performance revalties to recording vocalists, musicians, and record companies.

More than twice all of those payments combined.

AN INCREASE IS NOT JUSTIFIED

The economic facts, detailed by Dr. John Glover and the Cambridge Research Institute, show there is no reason for an increase. Music publishers and composers are doing handsomely at the present rate. Their income from mechanical royalties has more than doubled in the past 10 years because of increased sales, which more than offsets inflation.

Significantly, in the 10-year debate over Copyright Revision, (up to today, at least) the publishers have not presented any data on their profits which would justify an increase. Yet, with no such supportive documentation to date, they ask for an additional \$47 million per year.

That proposed "penny" increase in itself is inflationary and will stick the public with an increase in record prices of almost \$100 million per year. That penny increase is punitive both to our industry and to the consumer. It will impose harsh burdens on small fledgling record companies. It could further discourage the already risky business of recording classics, jazz, and experimental music—all important cultural contributions of sound recordings.

Moreover, the public interest is being well served at the present rate. There is no monopoly on music, and plenty of music is available to the public. And these originally were the major Congressional objectives in establishing the compulsory licensing system, and the 2¢ rate.

TECHNOLOGICAL WINDFALLS FOR PUBLISHERS AND COMPOSERS

The basic case of the publishing industry boils down to the statement that a 2¢ rate established in 1909 cannot possibly be adequate in 1975 . . . and that "only

a penity" increase is anvolved. However, as we shall demonstrate, that 2¢ is far

different from what it was in 1909.

Every time a recording company arranges for an artist to record a musical composition, the record company must pay the music publishing company and composer a "mechanical royalty" for every record sold, and this rate was set in the copyright statute in 1909 at 2¢. This royalty was called "mechanical" because the state of the recording art at that time utilized "mechanical parts" such as a piano roll . . . or a one-time Edison wax cylinder. So 2¢ was paid for one tune, and one tune comprised a recording.

Recorded music next moved into a one-sided disk-still with 2¢ paid for one

tune on one record.

Now started the changes which benefited publishing comparies and composers so dramatically, with no additional risk or effort by them:

First, came the two-sided 10" 78 RPM disk which gave the publishing company and composer 4¢, not 2¢, from the sale of one record.

Then, in 1948, the vinyl long-playing album was developed, with 10 to 12 tunes on one disk. Publishing companies and composers earned 20¢ to 24¢ per disk, not 2ϕ or 4ϕ .

Finally, the ingenuity and risk capital of recording and equipment companies developed the 8-track tape cartridge and cassette. These created an entirely new additional market—about 29% of total record sales—each earning 20¢ to 24¢ for the publisher and composer.

MULTIPLE RECORDINGS MEAN MULTIPLE INCOME SOURCES

In addition, publishers and composers receive multiple income from the recordings of one composition. Once a given recording artist makes a hit of his version of a musical composition, then usually many other artists also record that now-familiar tune. For example, the hit song, "By The Time I Get To Phoenix", was made famous by Glen Campbell. There are currently 81 separately produced records of that song from the U.S. alone, not foreign . . . 81 separate sources for that 2¢ to multiply. "Bridge Over Troubled Waters", was made famous by Simon and Garfunkel's recording and has 80 current separate recordings. And Paul McCartney's hit recording of "Yesterday" has 91 U.S. recorded renditions . . . 91

multiple sources of mechanical royalty income.
So a composer's tune, made famous by one recording artist's hit rendition, suddenly can become a major financial asset and catalyst for these multiple

sources of income.

INFLATION NO JUSTIFICATION FOR RATE INCREASES

The music publishing companies claim that the rising cost of living justifies the proposed 59% rate increase. Music publishing companies which do the greater share of industry volume are not individual entrepreneurs-or homemakersworrying about the rising cost of bread or beef or gasoline. Instead, many are large corporate cwners of copyrights. Publishing companies deal in copyright catalogs as one would buy or sell any investment. Music copyrights are assets of value. The return on these assets has far exceeded any changes in the cost of ·living.

PUBLISHER FUNCTION IS ESSENTIALLY ADMINISTRATIVE

Publishers certainly cannot argue that they deserve more because they are doing more to make a recording a success. Once, music publishers performed many more creative, promotional, and marketing functions for their 2¢ than most do today for their 20¢ or 24¢. Their function today is heavily administrative and clerical; they are largely service entities, conduits for the processing of income and paper transactions. They don't promote as they used to. They don't advertise as they used to. They don't help create demand as they used to. They don't employ field representatives as they used to. These promotional functions necessarily have been taken over by recording companies. As the former president of the American Guild of Authors and Composers commented: "Years ago a publisher bought a song, plugged it, and got it performed, in eventual hopes of getting a record. Now a song is nothing without a record at the start.

Publishing companies deserve to be paid reasonably for their service func-

tions—but certainly not to split an added \$47 million a year.

A GROSS INEQUITY:

When this Subcommittee heard testimony on this issue a decade ago, it rejected the publishers' request for a 3¢ rate. At that time it reported out Section 115 with a 25% rate increase to 2½¢ per tune and ½¢ per minute of playing time. Although the recording industry vigorously opposed that increase, the Revision Bill in that form passed the House in 1967.

The bill remained in the Senate with a 2½¢ rate for more than seven years. Last year, without any hearings receiving additional economic evidence, the Senate Judiciary Committee raised the rate to 3¢ per tune, adding a new damaging provision for ¾¢ per minute of playing time. This action was taken upon the music publisher's request for an alleged "inflation adjustment"—an argument which was, at best, spurious and, at worst, blatantly misleading.

CONCLUSION

There is no economic justification today, just as there was no justification in 1963 when this Subcommittee last considered this bill, for a 3¢ mechanical rate. Indeed, hard, cold, economic facts demonstrate irrebuttably that the 2¢ rate is still fully adequate today. Since the public is now being well-served, and since economic facts do not justify any increase, we urge that Section 115 be amended to provide for a continuation of the present 2¢ rate.

Further supporting data is detailed by Dr. John Glover of the Cambridge Research Institute and the Harvard Graduate School of Business Administration.

ADDENDUM

Data developed by the Recording Industry Association of America indicate that 34.4% of total album unit sales consist of club, mail order, premium and budget record sales. More specifically, the RIAA estimates the following mix of unit sales for 1974:

	Amount (million)	Percen
Total album units	276	160.0
Club	23 27 15 30	8, 3 9, 8 5, 4 10, 9
Total	95	34. 4

ADDENDUM TO STATEMENT OF STANLEY M. GORTIKOV

RE: RIAA SUPPORT FOR JUSTICE DEPARTMENT ANTIPIRACY AMENDMENTS

RIAA strongly supports the proposed antipiracy amendments set forth in the testimony of the Department of Justice before this Committee on May 8, 1975. We detail our comments on these various proposals below.

The most important amendment makes certain that the copyright revision bill does not preempt the law of 36 states which provide antipiracy protection for pre-1972 sound recordings. The recording industry would seriously have to consider opposing any revision legislation which would unjustifiably deny states this essential weapon against rampant record piracy.

1. Amendment to Section 301(b) to confirm the validity of state antipiracy laws.—Congress granted federal copyright profection to sound recordings fixed on or after February 15, 1972 (P.L. 92-140). The protection for records issued before February 15, 1972 was left to the states. The Supreme Court has confirmed that states have the authority to enact antipiracy laws for sound recordings issued prior to February 15, 1972 and that are records are not in the "public domain." Goldstein y. Galifornia, 412 U.S. 5 (1973).

Pursuant to this authority, 32 states 'y provide protec cordings issued prior to February 15, 15. ates with anticolude:

y provide protection for sound reates with antipiracy statutes in-

Álaská Indiana Nebraska Pennsýlvaniá-South Carolina Arizona Iowa. Nevada Kentucky New Hampshire South Dakcta Arkansas Tennessee California Louisiana New Mexico Maryland New York Texas. Connecticut Florida Massachusetts North Carolina Utah Oklahoma Georgia Minnesota Virginia Illinois Washington Mississippi Oregon.

In addition, in four states there are judicial decisions that the state common law of unfair competition prohibits record piracy: Michigan, Missouri, New Jersey, Wisconsin.

Antipiracy legislation for pre-February 15, 1972 sound recordings may become

law in other states this year.

The Justice Department is concerned that Section 301 of the bill, which deals with preemption of state laws, be clarified so that no one could claim that the revision bill supersedes the many existing state antipiracy laws relating to records issued before February 15, 1972. We strongly support the Justice amendment to include a new subsection (4) to Section 301 (b) as follows: "(4) Sound recordings fixed prior to February 15, 1972." The proposal contained on page 28 of the Department of Justice testimony is absolutely essential as far as the record industry is concerned. We believe there is no justification whatever for the Congress to preempt the 32-state antipiracy statutes and the judicial decisions of four additional states. The consistent determination both of Congress and of the states has been that record pirates unfairly and improperly appropriate the property, efforts, and capital of the legitimate business community. Pirates today divert about \$175 million of legitimate record and tape sales. About one out of every four tapes sold is a pirate copy of an original hit recording.

The entire legitimate music industry has taken a strong stand against record piracy. The American Federation of Musicians had a vital stake in this question because record pirates make no contributions to music trust funds or make any

other payments to the musicians creating recordings.

Local retailers are placed in a totally unfair position trying to compete with cheap pirate copies. The pirates copy only the best-selling records, skimming the

cream off the top.

Further, the preemption of state antipiracy laws would result in the anomalous situation that legitimate record companies would, as a matter of Federal policy, be authorized to copy the pre-1972 catalogue of all of their competitors. This could, of course, lead to a decrease in competition because the valuable property rights reflected in the pre-1972 catalogue of small and medium companies could be expropriated by larger record companies. Significantly, this potential result was persuasive in the decision of this committee to reject a compulsory license for sound recordings. See H. Rep. 92–487, 92nd Cong.. 1st Sess., p. 4.

Finally, protection against piracy of pre-1972 recordings is of particular importance because older music has been enjoying resurgence. The equity of state law protection for these older recordings is underscored by the fact that 36 states already have antipiracy protection for pre-1972 recordings and many of the remaining states are currently considering such legislation. There is no justifica-

tion whatsoever to preempt these essential state laws.

2. Derivative Rights Under Section 114.—We strongly support the view of the Department of Justice that Section 114 of H.R. 2223 should make explicit that the owner of sound recordings has the right to make a derivative work under Part (2) of Section 106. We believe, as the Department of Justice asserts, that under Section 7 of the 1909 Law an owner of a sound recording presently has this right. The recent Taxe case confirms record company's rights in this regard under the 1909 Law. There has been no showing why these rights should be narrowed or limited under the revision legislation. Indeed, we are concerned, as is the Department of Justice, that unless this potential loophole is expressly closed, there may be a "backdoor" opportunity for record pirates to copy copyrighted sound recordings by slightly altering the original copyrighted material.

3. Section 506(a).—We agree with the Department of Justice proposal on pages 28-29 of its statement that the term of imprisonment for repeat offenders for record (and movie) piracy should be increased to three years, consistent with the

other provisions of 506(a). Indeed, the legislative history of the record piracy legislation indicates that Congress feels that record piracy is of greater societal concern than other infringements. Therefore, the Department of Justice proposal

to provide at least an equivalent term of imprisonment is fully justified.

4. Section 506. Destruction of Infringing Articles.—Finally, we urge the inclusion of the amendment to Section 506 noted on pages 24 and 25 of the Department of Justice testimony. Although we believe a reading of the present copy right law may permit the Government to destroy infringing articles, this has been a matter of some debate. Therefore, the Government powers should be made explicit. This would preclude the necessity of the recording industry filing expensive—and essentially superfluous—civil suits to permit the destruction of infringing articles after the Government has successfully concluded its criminal prosecution.

Mr. Gortikov. Gentlemen, I am president of the Recording Industry Association of America. Our member companies create and market about 85 percent of the recorded music sold in the United States.

We strongly object to the proposed mechanical royalty rate increase in section 115. The mechanical royalty is the amount of money a music publishing company can charge a recording company for the use of a

composer's tune in a sound recording.

Section 115 proposes a statutory increase for mechanical royalty from 2 cents to 3 cents. This increase is glossed over as "only a penny" increase. However, that seemingly innocuous penny involves added payments of about \$47 million per year to the music publishing industry, which is an increase of 59 percent.

The \$47 million "penny" payment is the biggest money issue in this bill, and it is the major commercial and consumer question before this committee. It is more than 11 times greater than the \$4 million

annual payment by jukeboxes provided in section 116.

It is more than seven times greater than cable television's hotly contested payments to broadcasters of \$6.7 million per year. And it is almost five times greater than the estimated \$10 million for performance royalties to recording vocalists, musicians and record companies. It is actually more than twice all of those payments combined.

The economic facts, to be detailed by the next witness, show that there is no reason for an increase. Music publishers and composers are doing handsomely at the present rate. Their income from mechanical royalties alone has more than doubled in the past 10 years because of

increased sales, which more than offsets inflation.

Significantly, in the 10-year debate over copyright revision, up to today and including today, the publishers have not presented any profit data that would justify an increase. This morning I scanned the material that the publishers are offering into evidence here, and, once again, incredibly, there is not a sbred of profit information as to how well or how poorly they are doing in that mass of material they are going to offer. Yet, with no such supportive documentation to date, they ask for an additional \$47 million per year.

The text of their presentation—they are asking even for 4 cents,

which will be \$94 million a year.

That proposed penny increase in itself is inflationary and will stick the public with an increase in record prices of almost \$100 million per year at 3 cents, and \$200 million at 4 cents. That penny increase is punitive, both to our industry and to the consumer. It will impose harsh burdens on small, fledgling record companies. It could further discourage the already risky business of recording classics, jazz, and experimental music.

Moreover, the public interest is being well served at the present rate. There is no monopoly on music, and plenty of music is available to the public. And these originally were the major congressional object ves in establishing the compulsory licensing system and the 2-cent rate.

The basic case of the publishing industry boils down to the statement that a 2-cent rate established way back in 1909 cannot possibly be adequate in 1975, and that "only a penny" increase is involved. However, as we shall demonstrate, that 2 cents is far different from what it was in 1909.

This is a piece of music. It is a tune. Every time—peculiarly, it has a recording artist's picture on the front, not the composer. Every time a recording company arranges for an artist to record this tune, the record company must pay the music publishing company and composer a mechanical royalty for every record sold. This rate was set in the copyright statute at 2 cents. This royalty was called mechanical because the state of the recording art at the time utilized the mechanical parts, such as a piano roll or later a one-tune Edison wax cylinder, such as this one here. So 2 cents was paid for one tune, and one tune comprised a recording.

Recorded music next moved into a one-sided disk, like this one, one

tune and one side. And, again, one tune comprised a recording.

Now started the changes which benefited music publishing companies and composers so dramatically, with no additional risk or effort by them. First came the two-sided 78-rpm, 10-inch disk, which gave the publishing company and the composer 4 cents, not 2 cents, from the sale of one record.

Then in 1948 the vinyl long-playing album was leveloped, with 10 to 12 tunes on 1 disk. Publishing companies and composers earned 20 to 24 cents per disk, not 2 or 4 cents.

Mr. Wiggins. Excuse me, Mr. Chairman.

In the album which you have in your hand, is there only one composer involved, or are there multiple composers?

Mr. Gortikov. There are probably multiple composers involved.

There are rultiple composers involved.

Mr. Williams. You are speaking of the aggregate payment? To the

composer, it may be 2 cents.

Mr. Gontikov. The individual payment to the composer and publisher may be 2 cents, yes. The aggregate income would be 20 to 24 cents.

Finally, the ingenuity and risk capital of recording and equipment companies developed the eight-track tape cartridge and cassette. These created an entirely new market—about 29 percent of the total record sales, each earning 20 to 24 cents for the publishers and composers, not 2 cents.

In addition, publishers and composers receive multiple income from the recordings of one composition. I am holding a list of the current recordings of a familiar hit song, "By the Time I Get to Phoenix", which was made famous by Glen Campbell. This shows 81 separately produced records of that song from the United States alone, not foreign—81 separate sources for that 2 cents to multiply. "Bridge Over Troubled Waters", made famous by Simon and Garfunkel's recording, has 80 current separate recordings, and Paul McCartney's hit record-

ing of "Yesterday" has 91 U.S. recorded renditions, 91 multiple sources of mechanical royalty income.

So, a composer's tune made famous by one recording artist and his rendition, can suddenly become a major financial asset and catalyst

for these multiple sources of income.

The music publishing companies claim that the rising cost of living justifies the proposed 59-percent rate increase. Music companies which do the greater share of industry volume are not individual entrepreneurs or homemakers worrying about the rising cost of bread or beef or gasoline. Instead, many are large corporate owners of copyrights. Publishing companies deal in copyright catalogs as one would buy or sell any investment. Music copyrights are assets of value. 'The return on these assets has far exceeded any changes in the cost of living.

Publishers certainly cannot argue that they deserve more because they are doing more to make a recording a success. Formerly, music publishers performed many more creative promotional and marketing functions for their 2 cents than most do today for their 24 cents. Their function today is heavily administrative and clerical. They are largely service entities, conduits for the processing of income and paper transactions. They do not promote as they used to. They do not advertise as they used to. They do not help create demand as they used to. They do not employ field representatives as they used to.

These promotional functions necessarily have been taken over by recording companies. Publishing companies deserve to be paid reasonably for their service functions, but certainly not to split an added \$47

million or \$94 million a year.

When this subcommittee heard testimony on this issue a decade ago, it rejected the publishers' request for a 3-cent rate. At that time, it reported out section 115 with a 25-percent rate increase to 2½ cents per tune and ½ cent per minute of playing time. Although the recording industry vigorously opposed that increase, the revision bill in that

form passed the House in 1967.

The bill remained in the Senate with a 2½-cent rate for more than 7 years. Last year, without any hearings receiving additional economic evidence, the Senate Judiciary Committee raised the rate to 3 cents per tune, and added a new damaging provision for ¾ cents per minute of playing time. This action was taken upon the music publishers' request for an alleged "inflation adjustment"—an argument which is

at best spurious and at worst blatantly misleading.

There is no economic justification today, just as there was no justification in 1966 when this subcommittee last considered this bill, for a 3 cent mechanical rate, let alone one that is higher. Indeed, hard cold economic facts demonstrate irrebuttably that the 2-cent rate is still fully adequate today. Since the public is now being well-served, and since the economic facts do not justify any increase, we urge that section 115 be amended to provide for a continuation of the present 2-cent rate.

Further support will next be detailed by Dr. John Glover of the Cambridge Research Institute and the Harvard Graduate School of

Business Administration.

Mr. Danielson. Thank you, Mr. Gortikov.

I would like to inquire of the committee members present whether, in order to expedite this matter, we could hear from all of the opposi-

tion witnesses first. We could direct our questions to them, and then take up those supporting the increase. Would there be any objection

Hearing none, we will then—thank you. We will proceed with Mr. Glover. Thank you very much.

TESTIMONY OF JOHN D. GLOVER, DIRECTOR, CAMBRIDGE RE-SEARCH INSTITUTE, ACCOMPANIED BY GERALD A. SIMON, MAN-AGING DIRECTOR, CAMBRIDGE RESEARCH INSTITUTE, AND DAVID B. KISER, ASSOCIATE, CAMBRIDGE RESEARCH INSTITUTE

Dr. Glover. Mr. Chairman, members of the committee, my name is John D. Glover. I am director of the Cambridge Research Institute, and with me this morning is Mr. Gerald Simon, managing director of that institute, and Dr. David B. Kiser, a research associate; both

of whom, along with others, work on this project.

I would like to pick up where Mr. Gortikov left off. As he pointed out, we were here 10 years ago. Mr. Kastenmeier was also then the chairman of this subcommittee. We intend to lay before you, and we have presented to you through committee counsel, a summary of my remarks, as well as a supporting text and much longer document, together with the technical appendix which spells out in very great detail the sources and processing of the data and the nature of the sample, and all that.

Mr. Danielson. I believe, Mr. Glover, I will interrupt. The documents to which you refer are rather long and detailed. Unless there is objection from the members of the committee, we will accept the summary into the record, together of course with your comments. But the bulk of the documents will then be filed with our committee files

for our purposes. Will that be agreeable? Does anyone object?
Dr. Glover. As you please, sir. In our last presentation, they did in fact include the full statement, together with the technical

amendments.

Mr. Danielson. What I will do, then, is defer judgment on that latter portion until we have the full subcommittee plus the regular chairman. However, everything that is said here will be in the record, and the summary will, and the balance of the document will be a part of our files. If Mr. Kastenmeier wants to include it in the printed record, then he can make that decision.

[The summary and prepared statement of John D. Glover follows:]

STATEMENT OF JOHN D. GLOVER, DIRECTOR, CAMBRIDGE RESEARCH INSTITUTE, ON BEHALF OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA

Summary Statement on Section 115 of H.R. 2223

by John D. Glover Director Cambridge Research Institute

on behalf of the Recording Industry Association of America

before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary

United States House of Representatives Ninety-Fourth Congress, First Session September 11, 1975

SUMMARY

My name is John D. Glover. I am a Director of the Cambridge Research Institute, a management consulting firm located in Cambridge, Massachusetts. Our firm and its princials have made economic studies of many industries, including, among numerous others, banking, retailing, footwear, paper, telecommunications, coal, and hotels. We have also studied the health care field for hospitals and government agencies.

On behalf of the Recording Industry Association of America, we have made an extensive study of the economics of the recording industry. A particular focus of that study has been the effects of a possible increase in the statutory mechanical royalty for the licensed use of copyright music, and specifically the issues raised by Section 115 of H.R. 2223.

We appeared on behalf of the recording industry just 10 years ago, when an omnibus Copyright Bill was being considered. In preparation for these hearings, we have collected a mass of new data that bear on the economics of the recording industry over the past decade.

It is our hope to lay before this Committee the economic data which are essential for an understanding of the economics of recorded music and for an equitable judgment on Section 115 of the Copyright Bill now before you.

In addition to this summary, we should like to have included in the record the appended detailed analysis of the recording industry and of the impacts of the proposed changes in the Copyright Act that relate to royalty payments for the use of copyright music.

To summarize, as shown in Exhibit A, our study leads to two major conclusions thoroughly documented by firm statistical data:

• FIRST, there is no economic justification for increasing the statutory royalty rate.

The music publishing industry has argued that a higher rate is justified by virtue of inflation. We shall show that, in fact, income going to music publishing companies and other owners of copyright music has risen much faster than inflation, as measured either by (a) the Consumer Price Index, or (b) Median Family Income. In fact, publisher income from mechanical royalties has more than doubled in the past 10 years.

• SECOND, the higher rate would have serious impacts on all other interested parties:

- There would be considerable pressure for a rise in record prices -- of perhaps as much as \$100 million to consumers and other buyers of recordings, including the jukebox industry.
- Profits of record makers, especially smaller ones, would be under grave, not minor, pressures.
- The incentive to record and release new and experimental, and hence unknown and riskier music -- and performances by unknown artists both popular and "serious" -- would be impaired.
- Employment in the recording industry would tend to fall. This would affect artists, working musicians, sound technicians, and production workers.

A No economic justification for an increase

Copyright owners' income has outpaced inflation

Increased statutory rate could hurt:

- consumers
- recording artists and musicians
- record makers

THERE IS NO ECONOMIC JUSTIFICATION FOR RAISING THE ROYALTY RATE

Let us respond first to the arguments of the publishing industry that a higher statutory rate is justified simply by the passage of time and by inflation. As to those arguments, we would like to place before you several facts.

Price Per Tune Is Down; Copyright Owners' Share Is Up

FIRST, let me draw your actention to Exhibit B.

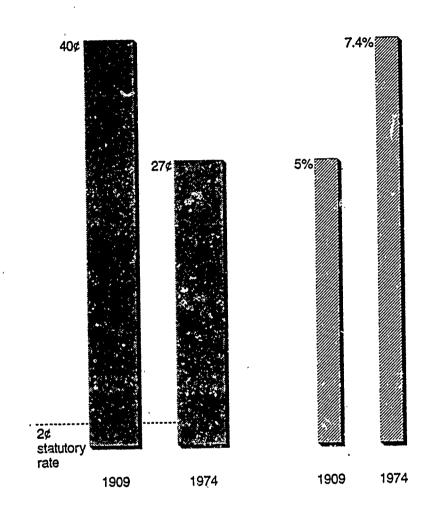
When the statutory rate was set at 2¢, the price received by a record maker was 40¢ for a typical record, which then had a single tune on one side. The royalty then represented 5% of the recording company's price.

Since then, because of technological progress, the price per tune has fallen. A record maker now typically receives something like 27¢ per tune, in current, cheaper dollars, for a two-sided "single" and for each of the 10 to 12 tunes included on a 12-inch LP record.

At the same time, the share going to music publishing companies and other copyright owners for royalty payments has increased by half and now represents 7.4% of the producer's price.

And it must be noted most especially that this greater share going to publishing companies <u>per record</u> now applies to the <u>enormously increased</u> volume of records and tapes now being sold.

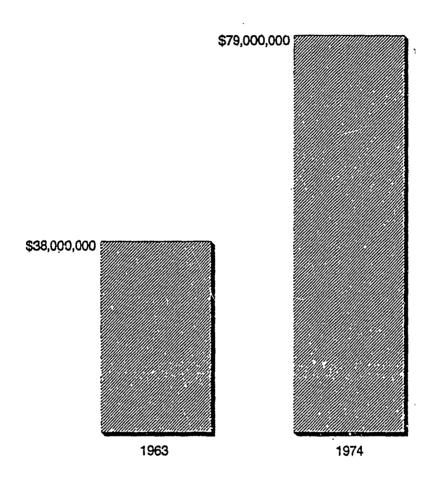
B Price Copyright per tune owners' is down share is up



___Mechanical Royalties Have Increased

- SECOND, largely because of recording industry innovations such as prerecorded tape, the volume of recording sales has grown rapidly over the last decade. Consequently, as shown in Exhibit C,
 - Total royalty payments received by publishing companies and others from phonograph records have increased greatly. Over the past decade, these royalties from the United States, alone, have more than doubled, from \$38 million to about \$79 million.
 - In addition, royalty payments to publishing companies and other copyright owners by foreign record makers rose from about \$7 million in 1963 to about \$35 million in 1975. Much of this was from foreign pressings of U.S.-made recording masters.
 - When incomes of publishing companies from recordings are being considered, it is altogether proper to take into account that they also receive performance royalties from the commercial uses of phonograph records and tapes. Performance royalties to publishing companies and other copyright owners for radio broadcasting of records amounted to about \$34 million in 1973. In addition, they received a large sum for the use of phonograph records and tapes in commercially produced "background" music.

C Mechanical royalties have more than doubled

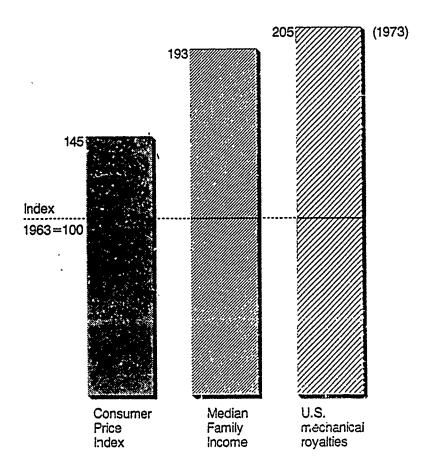


Mechanical Royalties Outpace Inflation and Median Family Income

- THIRD, as shown in Exhibit D,
 - Royalty payments to publishing companies by record makers have increased much faster than both
 - (a) the Consumer Price Index and
 - (b) Median Family Income.
 - Expressed in index numbers, the Consumer Price Index went from 100 in 1963 to 145 in 1973. Over the same period, Median Family Income rose, in terms of index numbers, from 100 to 193. Thus, Median Family Income went up faster than inflation.
 - Mechanical royalty payments by the U.S. recording industry went up faster than either the Consumer Price Index or: Median Family Income. These payments, also in terms of index numbers, went from 100 to 205. If overseas royalties from the use of U.S.-made masters were included, these payments would have gone still higher.

D Mechanical royalties outpace inflation & median family income

1963 vs.1973

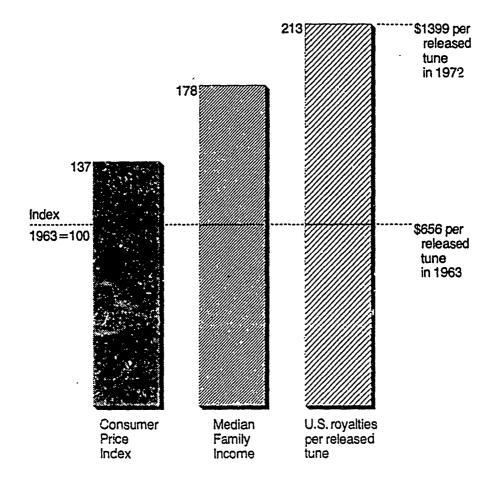


Mechanical Royalties Paid Per Released Tune Outpace Inflation and Median Family Income

- Now, one last point in the inflation argument. If, as our evidence suggests, the vast majority of mechanical royalties are paid on recent releases, then the mechanical royalties paid per released tune gives a typical picture of what each release yields. As shown in Exhibit E,
 - The average mechanical royalty paid per released tune has also increased notably faster than inflation, from \$656 in 1963 to \$1,399 in 1972. In index terms, this is an increase from 100 to 213.
 - Many tunes are recorded by a variety of artists and each new recording provides additional royalty income from a single composition.

E Mechanical royalties paid per released tune outpace inflation and median family income

1963 vs.1972



13

To summarize the inflation argument:

- The share of the proceeds of record sales going to music publishing companies and other copyright owners is substantially greater than it was when copyright in recorded music was granted and the statutory rate was established.
- The total dollar amount of those payments is vastly, enormously greater than it was at that time.
- The proceeds from these royalties, as measured both in the dollar aggregate and in terms of royalties received per released tune, have beaten inflation by a wide margin, as gauged by either the Consumer Price Index or Median Family Income.

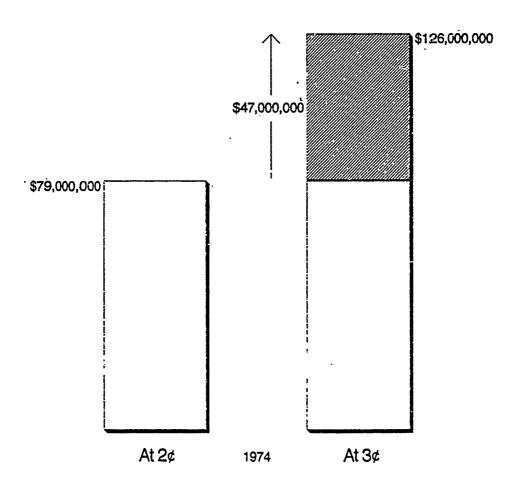
RAISING THE ROYALTY RATE WOULD HAVE SERIOUS IMPACTS

We now move on to consider the <u>impacts</u> of the proposed increase in the royalty rate on the recording industry and others. To understand these impacts, please consider Exhibit F.

Under The Proposed Rate, Payments To Copyright Owners Would Go Up \$47 Million

- It should be noted that in 1974 U.S. domestic royalty payments were about \$79 million. These payments were made under the present statutory rate of 2¢.
 - Under the proposed rate of 3¢ or 3/4¢ per minute for overtime, these payments would have gone up by about \$47 million to something like \$126 million.
 - An increase of this size in mechanical royalties must have serious impacts on the recording industry and parties interested in it.

F Payments to copyright *owners would go up \$47,000,000



If Fully Absorbed, The Cost Of Increased Royalties Could Cut Record Makers' Profits By \$47 Million

FIRST: The most obvious possible impact could be a decrease in profits of record makers.

- In 1974, the second-best year the recording industry ever had, the pre-tax profits of the entire U.S. recording industry from all sources were not greater than \$121 million. If all of the increase in the royalty payments were to come out of that pre-tax figure, total industry pre-tax profits from all sources would have been something like \$74 million, that is to say, 39% less than they were.
- Pre-tax profits of the industry from records made and sold in the United States came to \$50 million in 1974. The proposed increase in mechanical royalties of \$47 million would take 94% of those pre-tax profits.
- Actually, any impact on profits would not be distributed evenly
 among all record makers. The marginally profitable and the
 smaller companies would be hit especially hard; many of them
 would be driven into the red.

Annual Cost To Consumers Could Go Up \$100 Million

SECOND: Since recording companies could not be expected to absorb this kind of increase, the second kind of impact of the higher royalty rate could be higher prices to consumers. As shown in Exhibit G, if the rate increase were to be passed downstream through wholesalers and retailers to the ultimate buyers, actual retail prices could move up something like \$100 million per year.

G Annual cost to consumers could go up by...

19



Recordings Of New Performers And Music Forms Novald Be Riskier

THIRD: As portrayed in Exhibit H, higher royalties could cause a reduction in the number of recordings brought out.

- e Higher royalty rates would raise the breakeven point of releases.

 The breakeven point is the number of copies of a record that have to be sold in order to recoup the cost of making a recording and getting ready to sell it. These initial outlays have to be covered before a record maker makes his first penny of profit.
- The probabilities are already low that these costs will be covered and that any profit whatever will be made.
 - The average breakeven point of popular LP's is up to 61,000 copies; and 77% of new popular LP's fail to recover their costs and to make any profit whatever.
 - Other types of releases -- 45 RPM singles and new "serious" and classical LP's, for instance -- offer even lower probabilities of covering their initial outlays and making any profit at all. Ninety-five percent of classical releases now fail to break even.
- e Raising the mechanical revalty rate could reduce the probabilities of profitable release still further. Offering new releases would be riskier. A reduction in the number of recordings released could ensue; the most vulnurable would be those releases felt to be the riskiest.
- Generally speaking, these risky releases are those of new and experimental music of all sorts and performances of unknown artists. These are the ones who would be hurt no most by a rise in the breakeven point due to higher mechanical royalty rates.
- One consequence of a reduction in the number of recordings made and releases brought out would be a reduction in employment for artists, musicians, recording studio people, and production workers.

H Breakeven point higher than ever

	Popular	Classics
	Number LP's to Break Even	Number LP's to Break Even
1963 1972	7,800 61,000	9,700 22,000
	Percent LP's Not Breaking Even	Percent LP's Not Breaking Even
1963 1972	61% 77%	87% 95%

A HIGHER STATUTORY RATE WOULD NOT BE "MERELY A CEILING," AS ARGUED BY MUSIC PUBLISHERS; ALONG WITH STANDARD VARIATIONS, IT WOULD BE THE RATE AT WHICH ROYALTIES ARE PAID

- The music publishing industry argues that a higher rate would merely be permissive; just "more room for bargaining" between the parties on the basis of their "relative strengths." The higher rate, it is argued, would merely be a ceiling to the outcome of bargaining.
- The argument suggests, by way of conclusion, that since the outcome of bargaining cannot be foretold, the effects of raising
 the statutory rate are uncertain, and may be not very
 significant.
- The notions and conclusion are fallacious. They disregard basic facts as to how the licensing and royalty collection process works, why it works as it does, and must work under any new higher rate.
- Any new higher rate would, together with standard variations, inevitably become the rate, just as the statutory rate is now, and for the same compelling reasons.

The Licensing And Collection Process

- The licensing of copyrights and the collection of mechanical royalties is a massive process. Organizations and procedures have been established that make it practical to handle the mass of detail economically and routinely.
 - Scores of publishing companies hold copyrights to thousands of tunes. Recording companies release more than 50,000 tunes a year -- over 200 per working day. Royalties must be paid and collected on these and on thousands of other active licenses issued in previous years.

In sum, there are three main kinds of possible impacts of higher royalty rates:

- Higher prices to consumers
- Lower profits to record makers
- Reduction of riskier recordings, innovative, ethnic and jazz musical offerings, and the works and performances of less well-known and younger composers and performers.

The actual impacts of higher royalties would be a mixture of these kinds of results. No one can say for sure in what proportions they would come to pass. But each and all of them are undesirable to everyone, except to music publishing companies and other parties to copyrights. All of them would operate to reduce employment in the recording industry.

None of these effects is called for on the grounds of compensating for the effects of inflation for copyright owners. Payments to them have been far outstripping inflation.

The proposed increase would result in a large windfall to the publishing industry not offset by any increased contribution by it to recorded music' -- its production, distribution or its enjoyment.

- The music publishing industry uses agents to issue the many licenses to the many record makers and to collect royalties on outstanding licenses from many licensees. One single agency, owned by publishing companies jointly, for years has handled a very large fraction of all licensing and collection:
- As regards the issuance of licenses for mechanical reproduction of copyrighted music, there are two avenues to obtaining a license: either through "he route of "negotiation" or through the "compulsory" route. According to the theory of the copyright law, a person wanting to use a tune in mechanical reproduction of music can try to "negotiate" a license from the copyright owner. Then, if a copyright owner is uncooperative or intractable, any party wanting to record a tune that has once been recorded may simply go ahead and do so and pay royalties at the compulsory statutory rate of 2¢ under conditions and procedures prescribed by the Register of Copyrights. In fact, the administrative and procedural mechanics of the compulsory route are cumbersome for all parties, and are only very rarely used. Instead, publishing companies have set up routine procedures for going the route of "negotiation". By definition and usage in the trade, any license that is issued under any procedure other than the "compulsory" provision is said to be "negotiated", even if -and this is crucial to understanding how the industry works the license is actually issued under the most routine, the most automatic procedure. But this practice of seldom invoking the compulsory licensing procedures should not be confused with paying the statutory rate, which, in fact, occurs in the vast majority of cases.
- The outcomes of this enormous licensing process must in all reality conform to a relatively straight-forward structure and routine.

When not issued at the statutory rate, licenses are issued at standard variations that perts 1 to common situations recognized in the trade. Exhibit I details this pattern of standard variations for a sample of 2,593 licenses, those being all licenses obtained by two recording companies over most of the year 1974. (Incidentally, these companies sold well over 50 million records last year.) The left-hand side of the exhibit shows that three main kinds of discounts from the statutory rate occur for regular price records:

- Artist discount, where the performer is also the copyright owner. These accounted for 5.1% of the rates on tunes from regular price records.
- Block discount, where a record contains several tunes owned by the same publishing company. These accounted for 3.0% of the rates paid on tunes on regular price records.
- Medley discount, where a tune or theme is used for a short period of time in combination with one or more tunes. These explained 2% of all rates paid on tunes on regular price records.

These three discounts together accounted for 10.1% o es paid on tunes from regular price records. These standard discounts _.so explained all of the rates on these tunes that were paid below 2¢. Fully 84.5% of tunes on regular price records were paid at the 2¢ rate, and the remainder, 5.4%, were paid more than 2¢.

We turn now to a discussion of records in the sample which were sold at other than regular price, shown on the right-hand side of Exhibit I. These include "budget label" records, which are often reissues released sometime after an original release on a regular price label; and "club" records, which are records sold at reduced prices through a record club, much like a book club. Here, discounts are much more prevalent in the mechanical rates paid. Fully 37% of all rates paid were "budget" or "club" dis acts. When a record is released through a "club", as anyone knowledgeable in the trade can testify to, the mechanical rate paid in almost all cases will be "5% of the original commercial rate. There is cer-

Rates paid are statutory rate and standard variations

	Regular Price Records	Other Records
2¢ Rate	84.5%	6.3%
Above 2¢(Overtime)	5.4%	2.5%
Standard Variations Below 2¢	10.1%	89.5%
Artist interest discount Block discount Medley discount Budget & club discount	5.1% 3.0% 2.0% 0%	0.8% 1.6% 0% 87.1%
Other	0%	1.7%

(Sample of 2,593 licenses in 1974)

tainly no bargaining here. If the originally licensed rate was 2¢, the club version will be paid at 1.5¢, purely and simply. This is standard, widespread industry practice.

- Likewise, "budget discounts" are granted routinely by most publishers for those albums selling for around a \$3 list price. Although the extent of the discount offered may vary from publisher to publisher, the practice is a routine and common one for every publisher to follow.
- You will note that the left-hand column of numbers in Exhibit I is in bold-faced type. This is to reflect the fact that the sales volume of regular price records is very large in comparison with the volume of budget and club records sold. So, even though there are many rates paid below 2¢ for records sold at other than regular prices, RAAA data suggest that these club and budget records represent only about a third of all records sold.

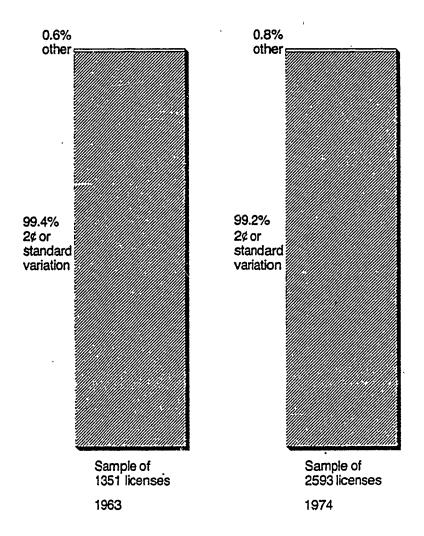
Licensing Under A Higher Statutory Rate

If the statutory rate is increased, licensing will be handled just as now, because of the following persistent, compelling reasons.

- More than 50,000 licenses a year will continue to be issued on behalf of scores of publishing companies to scores of recording companies.
- Licenses will continue to be issued in a routine, near-automatic fashion through licensing and collecting agents, and with the vast majority of licenses being issued at the statutory rate or standard variations therefrom.
- Only rarely will there be significant individual bargaining between a particular publishing company and a particular recording company for licensing under unusual terms and conditions. It is neither practical nor necessary for publishing and recording companies to spend much time or effort bargaining over royalty rates on thousands of individual tunes in advance of release of recordings and albums, because no one knows whether a tune will be successful or not.

- The foregoing facts explain why it is that over 99% of all licenses are issued routinely at the statutory rate or standard variations therefrom. As Exhibit J shows, this was the case ten years ago -- and it is the case today.
- For the same reasons, under a higher statutory rate, the vast majority of licenses would also be issued routinely and in near-automatic fashion at the new statutory rate or at standard variation therefrom.

J In 1974 as in 1963 tunes were licensed at 2¢ or standard variations



Conclusion

Let me now sum up the conclusions of our study. An objective analysis of the recording industry must reach the conclusions shown in Exhibit K.

- No increase in the statutory royalty rate is justified.
 - Copyright owners are getting a larger share of the proceeds of recorded ausic.
 - Copyright owners are also <u>far</u> ahead of inflation; their incomes have increased <u>much</u> faster than both the Cost of Living and Median Family Income.
- An increase in the statutory rate would have impacts quite contrary to the public interest. These would include:
 - Pressures toward higher record prices.
 - Reduction in riskier, experimental, innovative musical offerings.
 - Reduction of exposure of newer and lesser-known artists and groups.
 - Reduced employment of musicians, studio engineers and technicians.

What I have just presented is a summary of the extensive, heavily documented study that has been placed before you.

I would be glad to answer any questions you may have.

K No economic justification for an increase

Copyright owners' income has outpaced inflation

Increased statutory rate could hurt:

- consumers
- recording artists and musicians
- record makers

END

OF

SUMMARY

I. THE HIGH INCOME ENJOYED BY COPYRIGHT OWNERS

A. - THE LONG STANDING OF THE STATUTORY MECHANICAL ROYALTY DOES NOT, OF ITSELF, JUSTIFY AN INCREASE IN THE STATUTORY RATE

The passage of time does not, of itself, justify an increase in the royalty rate record makers pay copyright owners: Unlike most other prices, record prices have been cut nearly in half as compared to 1909, hence; the 2¢ royalty gives copyright owners today a larger share of a recording's price than 66 years ago.

1. Background

The Copyright Act of 1909 gave owners of music copyrights a property right in the recording use of that music for sale. It provides that, once a license for recording a tune has been granted by the copyright owner to any one party, then a license must be granted also to any and all other parties requesting a license, and at a rate of 2¢ per part, that is, for each tune on each record. This 2¢ rate is often referred to as the "statutory" rate.

The copyright license royalty is widely referred to as the "mechanical royalty" because it is paid for the use of any tune recorded by any mechanical means, for commercial purposes, whether on player-piano rolls, as was common in 1909, on long-playing records, or on tapes.

The purpose of the compulsory feature of the law was, of course, the prevention of monopolization of recorded music by publishing companies and/or record companies. Such monopolization was then a clear and present danger which has since been averted and diminished by this feature of the copyright law.

As a matter of fact, the compulsory procedure of issuing licenses for the use of copyright music in recordings is almost literally never resorted to. It is too inconvenient and cumbersome for all concerned. With few exceptions, licenses are issued almost automatically, in a nondiscriminatory fashion, to any and all applicants in accord with established procedures and through established organizations. As we shall show later on, more than 99% of all licenses are paid for at the 2¢ rath or at standard variations therefrom.

The royalty is typically paid by a record maker to an agent whose business it is to collect such payments for music publishing companies and other copyright owners. These receipts by publishing companies and others are commonly, but not always, shared on a fifty-fifty basis with composers, according to terms of particular contracts. Sometimes, a composer's interest in a copyright is bought out by a copyright owner, for instance a music publishing company.

Nowadays, a number of performing artists and groups form their own companies for making recordings, and sometimes, their own publishing companies for holding the copyrights to music they compose or purchase as well as perform.

2. Argument of the Music Publishing Industry

Publishing corporations and other copyright owners argue that the statutory license royalty, which has remained essentially unchanged since 1909, does not take account of the inflation that has occurred over the years. Consumer prices, they point out, are now much higher than they were in 1909; and yet the statutory royalty is still 2¢ per tune. At first sight, the general rise in prices might seem to justify an increase in the rate.

Some Facts

However, this seemingly plausible argument overlooks some important facts. The first is that record prices have not escalated along with other prices since 1909, but are now actually very much lower. Back in 1909, record makers sold a record with one tune on one side.

The price they received was 40¢. The price per tune was 40¢. In 1974, for a far better product, the record makers received for a two-sided 45 RPM "Single" a price of 54.8¢. That amounts to 27.4¢ per tune as compared to 40¢ in 1909.

When the 1909 statute was passed, Congress took note of the fact that the statutory royalty rate represented 5% of the maker's price. Because the price of recorded music is now lower, that rate, of course, represents a higher percentage of the price. In fact, that royalty now represents 7.4% -- a share in the proceeds that is almost 50% greater than seemed reasonable at the time.

In sum, music copyright owners today are getting a larger sum of a recording's price than they did in 1909. (See Exhibit 1.)

As we shall show later on, this is only part of the story about the relationship between inflation and copyright royalties. Not only are copyright owners getting a larger percentage of a recording's price, their total income from recordings of their tunes has grown enormously with the vast increase in the volume of recordings sold in this country and abroad -- a sales growth to which publishing corporations have not contributed. The increase in sales of recordings has resulted in an escalation of total copyright royalties which has been far more than would have been needed to offset the effects of inflation.

On top of mechanical royalties, the music publishing industry also receives large income in the form of performance royalties from the use of recorded music on radio, in commercially supplied "background" music, and on some television programs. (The recording industry and performing artists, arrangers, and musicians receive no such performance royalties.) To see whether an increased mechanical fee can be justified, it is necessary to understand the total income which copyright owners receive from recorded music.

Exhibit 1
STATUTORY LICENSE ROYALTTES AND RECORD COMPANY PRICES
1909 VERSUS 1974

	1909	1974
Statutory license royalty per tune	2¢	2¢
Record company price per tune	40¢ª	27.0¢ ^b
Statutory license royalty as % of record company price	5.0%	7.4%

- The price per tune charged by record.makers was 46% higher in 1909 than in 1974.
- The 2¢ mechanical royalty is a higher percentage of record makers' prices in 1974 than it was in 1909.
- Thus music publishing corporations and other copyright owners are now earning a higher proportion of the revenues derived from the sale of records.

In 1909 the price of a one-sided record sold to wholesalers was 40¢. The 2¢/tune statutory license royalty was recognized to be 5% of the price to wholesalers: 2¢=5% of 40¢. (See Harry Henn, The Compulsory License Provision of the U.S. Copyright Law, Study No. 5, Copyright Law Revision Studies, Washington: Government Printing Office, 1960.)

bFrom a survey by CRI of 13 recording companies, it was reported that in December 1974 the average price at which they sold an L? album was \$2.84. Each had an average 10.5 tunes, making the price per tune = 27c. The same survey also revealed that record companies sold a 2-tune 15 RPM record for an average price of \$0.548. This works cut to 27.4¢, a comparable figure.

- I. THE HIGH INCOME ENJOYED BY COPYRIGHT OWNERS (Cont'd.)
 - B. THE INCOME PROVIDED TO THE MUSIC PUBLISHING INDUSTRY FROM RECORDINGS HAS GROWN MUCH FASTER THAN INFLATION

The income provided to the music publishing industry by recordings -measured in the dollar aggregate, and per recorded tume -- has grown
very rapidly. It has grown faster than inflation. It has even grown
faster than "Median Family Income." Music copyright owners' income from
recordings comes not only from mechanical royalties paid by U.S. record
makers. They also get incomes from payments of mechanical royalties by
foreign record makers, including foreign companies that make, and sell,
records abroad from American-made master recordings. Copyright owners
also receive large and growing incomes from records used in radio and
television broadcasting, and in providing "background" music that is a
widely sold service.

Not only is the share of revenues from the sale of recordings that goes to publishing companies and other copyright owners much greater than originally visualized by Congress, but their dollar incomes from recordings have, in fact, increased very much faster than inflation.

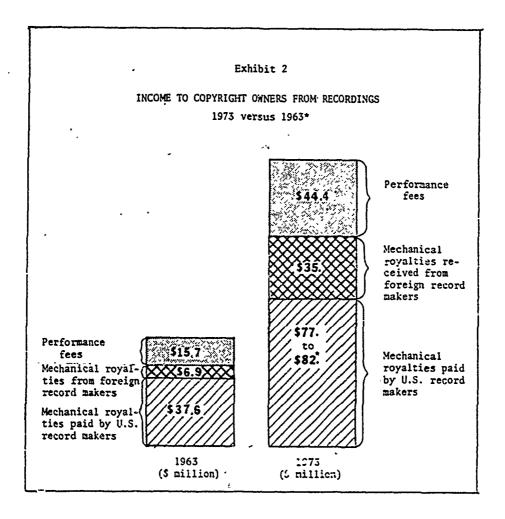
1. Inflation in the Decade 1963 and 1973

Between 1963 and 1973, the average annual Consumer Price Index, based on the year 1967, rose from 91.7 to 133.1, an increase of 45%.* In those years, Median Family Income, that level of income where 50% of American Families have more and 50% have less, and which takes into account both dollar inflation and increases in real income besides, rose from \$6,265 in 1963 to \$12,051 in 1973, an increase of 92%.

How did the American music publishing industry fare in comparison, as between those years? Let us examine what happened to each of the several kinds of income that copyright owners derive from recordings. The following facts are set forth in Exhibits 2 and 3.**

^{*} See 1974 Statistical Abstract of the United States.

^{**} The year 1973 was used in this connection, being the latest year for which certain important data were available. See NOTE to Exhibit 3.



^{*} Derivation of figures is explained in Exhibit 3, Notes a and b.

Exhibit 3

DICONZ TO COPYRIGHT CENERS FROM RECORDINGS
1973 VETSUS 1963

	1963 (\$ million)	1973 (\$ million)	1974 (f willion)	* Increase 1963 - 1973	Comparable 1 Increase 1 Consumer 2 Price Index 1943 - 1973	Comparable % Increase in Median Family Income 1963 - 1973
Estimated mechanical royalties paid by U.S. record makers	\$37.6	\$77 to \$82ª	179 to 1838	+1029 to ~1189	1	
Estimated mechanical royalties received by U.S. copyright holders from foreign record makers	\$6.9	\$53 * }	, [%]	•40T \		
Estimated total mechanical royalties	\$44.5	\$112 to \$3117	, M	+1531 to -1631	458	. 931
Sstimated total performance fees from records paid to U.S. copyright holders	\$15.7	244.4	: ····································	-2534		
Estimated total income received by U.S. copyright holders from mechanical royal- ties and performance fees from records	\$60.2	\$156.4 to \$101.	XA.	* +260% to +268% ! !		1

NOTE: The year 1973 is used in this Exhibit, being the latest year for which data of performance fees and royalties from foreign record companies were available.

The two figures given for 1973 copyright royalties paid by U.S. record companies are based on two different CRI surveys of record companies. The lower figure (377 million), which is estimated from statistics sumplied by thirteen record companies with about 578 of the industry's sales, will be found in Exhibit 5-C, line 9, page 17. The higher figure (323 million), which is estimated from statistics sumplied by 14-record companies with about 980 of the industry's sales, is explained in the last section of Exhibit 5-O, page 18 The lower estimate is clearly too low, for the financial records of the 14 companies in the larger survey show that these companies alone paid 350.4 million in mechanical fees in 1973 Nevertheless, we shall use the lower figure whenever we are comparing it to other data from the 14-company survey or when we are making trend analyses. We shall use the higher figure only when we make a single point estimate of the level of mechanical royalty payments.

The explanation for the two different figures given for 1974 is the same as given in footnote "a" above.

C1973 and 1963 performance fees were estimated. See Technical Appendix.

Jources:

- The 1955 figures are from the 1965 Glover report before the Subcommittee on Patents, Tridemarks, and Topyrights
 of the Committee on the Judiciary, U.S. House of Representatives, 19th Congress, First Session.
- The 1975 figure on foreign mechanical coyalties as astumated from <u>Sillboard</u> reports about sales abroad of recordings of U.S. music.
- The two 1973 figures on mechanical royalties paid by J.S. recording firms are from Exhibit 3 and Jotes thereto. See footnote "a" above.
- The 1974 figure for mechanical royalties paid by J.S. recording firms is from Exhibit 5 and is based on statistics supplied by 14 record makers.

2. Mechanical Royalties from U.S. Record Makers

Between 1963 and 1973, mechanical royalties paid by U.S. record companies more than doubled from \$37.6 million to \$77.4 million.

That is an increase of something of the order of 113%. This is to be compared to the increase of 45% in the Cost of Living Index and the increase of 93% in Median Family Income.

3. Mechanical Royalties from Foreign Record Companies

In addition to those domestic mechanical royalties, copyright owners also receive royalties from foreign record makers. A substantial fraction of those foreign royalties come from the use of master recordings made by U.S. recording companies in the United States and that are licensed for manufacture and distribution abroad by non-U.S. companies. Foreign royalties have grown even faster than U.S. royalties. Mechanical royalties received by U.S. copyright owners from record companies abroad rose from \$6.9 million in 1963 to \$35 million in 1974. That is an increase of 407%.

4. Total Mechanical Royalties

Total mechanical royalties paid to publishing companies rose, therefore, from \$44.5 million to somewhere around \$115 million, say by something like 158%.

5. Incomes to the Publishing Industry from Commercial Use of Recordings

In addition to mechanical royalties from record makers, copyright owners get large and growing incomes from the use of recordings in radio and television broadcasting and in commercially supplied "background" music. These are known as performance royalties. In 1965, publishing companies and others got from broadcasters and others, something like \$15.7 million for the use of recorded music. In 1975, they obtained at least \$44.4 million from those sources. This represents an increase of 283%. In addition, this bill provides that publishers and composers will, for the first time, receive performance income from jukebox operators who play sound recordings. This is estimated to provide an additional \$4 million income each year.

It should be noted in passing that, unlike the music publishing industry, recording companies receive not one penny in the form of performance royalties from commercial uses of their products, as in broadcasting and "background" music.

6. Copyright Owners' Total Income from Records

Taking these several incomes together, publishing companies and others, in 1963, derived from records and their commercial use a total income amounting to \$60.2 million. These kinds of incomes, in 1973, came to something like \$159 million. The 1973 figure represented an increase of over 260%, as compared to the increase of 45% in the Cost of Living Index and of 92% in Median Family Income.

These are the facts as to how music publishing companies and other copyright owners fared from recorded music in comparison to inflation.

7. Increase in Royalties Per Tune

Not only have royalties to copyright owners increased faster than inflation in the aggregate, royalties per tune have also increased faster. This has occurred because of two reasons: first, because of the expansion in recording media, a new tune is often released in numerous mechanical forms -- on a 45 RPM single, as a band on an LP, on an 8-channel tape or a tape-cassette. Royalties are paid on each unit of each of these forms, many times under several different licenses. Additional paying licenses will occur if the tune is later released through a record club, or if re-recorded on a budget album. Second, if a second or third or fourth artist also performs the tune, a separate license for each release will result in further royalties for the same, original tune.

Accordingly, a reasonably popular tune can be the subject of dozens and dozens of separately licensed "releases" in a single year. This number of "releases" of a single performance has been tending to increase as the numbers and popularity of different recording media have been increasing, and with reissues, often on "budget" labels, of former favorites.

One way of estimating the <u>trend</u> in royalties received <u>per tune</u> -- if not the literal dollar amounts -- is simply to divide the total dollar

value of mechanical royalties paid in one year by the number of releases in the year, and to compare that figure with the corresponding value in another year.* That is done in Exhibit 4, which measures the trend in royalties per released tune as between 1963 and 1972. Royalties per released tune went from \$656 to \$1,399, an increase of 113%. That percentage increase is a reasonable measure of the percentage increase in mechanical royalties per tune, although the dollar income per average tune would be considerably higher because of multiple releases per tune. Accordingly, the dollars of royalties per tune were going up faster than the royalties per release of that tune, which, themselves, were going up faster than inflation.

It should be noted and emphasized that these domestic mechanical royalties constituted only part of the income received by copyright owners from recorded music. They also received sizeable foreign mechanical royalties as Exhibits 2 and 3 make clear. In addition, their incomes from performances were about as great as the mechanical royalties and were also accruing faster than inflation.

* * * * *

We shall now turn to an examination of what has brought about the tremendous increases in incomes of copyright owners from recorded music.

^{*}The largest share of mechanical royalties occurs on recently released tunes, although many releases continue to collect royalties for many years.

Exhibit 4

STATUTORY MECHANICAL ROYALTIES FAID PER
RELEASE OF RECORDED TUNES: 1963 VERSUS 1972

		1963	1972	\$ Change 1963~1972
1.	Number of singles (45 RPM's) released ²	6,543	5,132	- 21%
2.	Estimated number of releases of tunes recorded on singles (num- ber of records released, times 2)	13.086	10,264	- 21%
3.	Number of LP's released	3,686	4,056	+ 10%
1	Estimated number of releases of tunes recorded on LPs (number of records released times 12 in 1963 and times 11.25 in 1972)		45,630	+ 3%
5.	Estimated total number of re- leases of tunes recorded (2+4)	57,318	SS,894	- 25
6.	Estimated total mechanical royalties paid by U.S. record companies	\$37.6 million	\$78.2 million	+108%
7.	License royalties per release of tunes recorded (6 ÷ 5)	\$ 656	\$1,399	+113\$

Note: For this Exhibit, the year 1972 was used because it was the latest year for which the numbers and releases were available.

^aStatistics on releases are from <u>Billboard</u>.

The 11.25 times per LP was calculated is follows: In 1965, there were approximately 12 times per popular LP. CRI's survey of 13 leading record companies, with 61% of the industry's 1972 sales, indicated that, on the average in 1972, a mechanical royalty of 22.5% was paid for each popular LP. With a 2% rate, this would indicate that the average popular LP had 11.25 times in 1972.

Chis overstates the number of times released, for one time may be recorded on both a single and an LP, a practice that was more common in 1972 than in 1963. Also, a given time may be recorded in several different versions on LP's or singles or both. The number of times recorded is only some fraction of the number of releases. The above figures of releases do not include tapes. (The copyright notices earn mechanical royalties from the sales of their times on tape, as well is on records.)

 $^{^{}m d}$ For source of data, see Exhibit 3D.

- I. THE HIGH INCOME ENJOYED BY COPYRIGHT OWNERS (CONT'D.)
 - C. THE MUSIC PUBLISHING INDUSTRY HAS NOT ONLY BEATEN INFLATION BY A WIDE MARGIN, BUT HAS BENEFITED MORE FROM ADVANCES IN RECORDED MUSIC THAN RECORD MAKERS WHO MAKE RECORDED MUSIC POSSIBLE AND AVAILABLE

Thanks to the revolution in recording technology and in marketing techniques, sales of recordings have risen many times over. The burgeoning sales have produced ever growing income for music copyright owners, who have consistently earned between 7.6% and 11.1% of record company sales -- far more than the 5% envisaged by Congress in the 1909 law. Copyright owners benefit greatly from the popularity of commercial use of records. The record makers, whose investments and ingenuity are largely responsible for the sales growth, have earned from these sales uncertain and sharply fluctuating profits, for this is a high-risk industry. Record makers, who have brought the consumer ever-better products, at a lower price than in 1909, are profiting less from the new products than the publishing companies which have invested little or nothing in the development of these products.

In order to reach an informed, not to say a fair judgment concerning the statutory mechanical royalty rate and whether it should be increased, one really must recognize and take under advisement some basic facts as to the nature and attraction of modern-day recorded music and the economics of the recording industry.

1. Recordings in 1909.

Seen from our present-day perspective, the recordings of 1909 -when Congress thought in fair that copyright owners should get as much
as 24 per recorded tune -- seem naive and quaint, both artistically
and technically. Recordings were made mechanically through an inverted
megaphone and the thin and scratchy results were physically pressed on
one side of a "wax" disc, one tune per disc. Or a mechanical reproduc-

tion of sheet music was produced through perforations in a roll of paper. The experience of listening to such music --- miraculous in its day, no doubt -- bears little relationship to the experience of listening to modern recorded music, popular or classical.

Recorded Music Today.

The technology of recording sound has advanced tremendously. Fidelity -- range, responsiveness, and freedom from distortion -- is only one aspect of this advance. Many and varied sound and musical effects may now be created through use of multiple microphones and amplifiers, and multi-channel recording tapes controlled through intricate electronic consoles.

This advancing technology makes extraordinary kinds and ranges of musical expression come alive through artistry of performance, arrangements, musical concepts, and through sound as something to be experienced for itself.

A tume, alone, a configuration of musical notes indicated on a sheet of paper, makes no music, let alone a musical experience. To become music, the tume at least must be hummed or picked out with one finger on a piano. A musical experience -- far beyond the tume itself -- is in large measure a matter of musical arrangement that reflects a concept. It is in very large measure a matter of, the artistry personality, and emotion of performance. In recorded music, today, the extra dimension of the artistry and technology of the generation and recording of sound is added, and it is often this ingredient that makes for a memorable musical experience.

In less than a generation, the recording industry has gone from "LP" to "Hi-Fi" to stereopnomic to quadraphonic sound: From "microgroove" to 3-channel, frequency-screened and corrected tapes.

These facts about modern recorded music are coming to be recognized and appreciated. An article in <u>The Wall Street Journal</u> described "How Record Producers Use Electronic Gear to Create Big Sellers".*

Each instrument has its own microphone leading to its own track on the big console's recording tape...[The producers] will cut, slice, and dub tracks from the best of the musicians' performances to eliminate flubs by one or two of them, and they'll pick tapes from the [singer's] performances for her best lead vocal. For her harmony parts, they can manipulate the tapes to make her sound like a duo, a trio, a quartet -- or even, if necessary, a 16-voice choir. They also will add violin flourishes, called 'sweetners'. Finally, they will blend and distill all this into two stereo record tracks.

Even a president of the American Guild of Authors and Composers has acknowledged that the popularity of tunes and songs is founded almost entirely upon successful recordings created and marketed by recording companies. Ho said:

Years ago a publisher bought a song, plugged it and got it published in the eventual hope of getting a record. Now a song is nothing without a record at the start.**

3. Benefits From, and Contributions to Recorded Music: Recording Companies and Publishing Companies.

Overview. In Parts A, B, and C of Exhibit 5, estimates are given of the revenues, various outlays, and profits of the recording industry for the years 1955-1964 and 1967-1974. Several important facts stand out among these data:

Growth in Record Retail Sales. Between 1955 and 1974, estimated record sales at retail <u>list</u> prices rose from less than \$280 million to about \$2.2 billion. These estimated retail sales are based on <u>list</u> prices, which has been the common standard for estimating retail sales over time. Because most recordings are sold at a sizeable discount, how-

The Wall Street Journal, February 12, 1974, p. 1.

The New York Times. August 3. 1966.

Eshibit 5-A
ESTIMATED FINANCIAL STATISTICS FOR THE RECORDING INDUSTRY. 1955-1974

Percentages of Yet Sales 1965 Survey Statistics 1955 1955 1957 1958 1259 1760 1962 1943 1961 1964 1. Contribution to Artists' Funds ž.31 2.5% 2:31 2.23 2.19 2.51 2.3% 2.11 4.Ó 2. Talent Costs 5.71 4.81 4.71 4.15 4.41 4.15 \$2.2 S. Recording Expenses 4.5% 3,51 4.41 4.21 4.0% 3.8% 4.41 4.15 4. Artists' Royalties 7.41 7.5% 8.81 8.61 9.7% 9.25 9.8 9.31 5. Total Artist & Recording Expenses (1+2+3+4) 19.75 18.33 20.21 10.11 20.03 20.11 20.6% 20.8% 6. Production & Manufacturing 43.18 40.1 43.11 43.05 42.1% 42.5% 42.61 42.0\$ 7. Sales, Prosccion, General & Administrative Expenses 23.61 21.19 22.51 25.31 23.61 23.2% 25.11 24.01 8. Total Costs Other Than Necha ical Royalties And Profits (5+6+7) \$6.45 79,51 85.8} 85.41 85.71 86.04 \$8.31 14.68 9. Copyright Mechanical Royalties 8.01 . 9.21 9.81 9.81 r. 91 8.91 11.01 11.11 10. Tutal Costs (8+9) 94.41 88.71 95.61 95.21 95.6% 94.95 99.31 97.91 11. Profits from Recording Sales Be fore Taxes & Foreign Fees, etc 5.18 0.81 11.31 4.41 4.81 4.43 2.15 5.61 12. Net Sales 100.0% 100.01 100.04 100.04 100.00 100.0% 100.0% 100.04 13. Foreign Fee Income, etc. b 2.31 3.1% 2.25 3.53 1.95 2.61 2.41 2.3% 14. Profits Mefore Taxes 7.5% (11+13) 7.19 7.5% 13.91 6.21 7.3% 4.15 4.41 15. Income Taxes 3.91 7.15 3.91 3.7% 3.73 2.5% 2.41 2.75 16. Not Profits After Taxes 3.41 6.81 2.91 3.41 3.81 4.11 1.73 1.7 Number of Reporting Firms 6 • 17 19 19 19 19 20 Estimated % of Industry Represented 57.41 \$4.0% 54.39 \$9.04 44.85 49.9% 54.23 60.01 Estimated Sales of All U.S. Recording Firms (Smillions) \$379 \$138 \$186 .\$230 \$255 3301 \$500 \$320 \$343 \$349 ı Retail Sales at List Prices
(\$millions) Records \$277 \$377 \$460 \$511 \$603 \$600 \$640 \$687 \$698 \$758 Tapes \$277 \$377 \$460 \$511 \$603 \$687 \$758 \$600 \$640 \$698 Total · 50.01 ·22.01 . 0.58 . 6.7% . 7.31 • 1.6% & Change from Previous Year +36.1% +11.15 +18.01 . 2.64

Proreign fee income and other miscellaneous income are not included in net sales. Foreign fee income is from the licensing of U.S. record masters for pressing oversess, and is estimated to be roughly one-half of the total figure shown. The remainder is from domestic fees from record and tape clubs, inventory adjustments, other one-time items, interest, and rent. They are expressed as a percentage of net sales to show how much they contribute to the profits recording firms make on their recording sales.

Execording firms sales are estimated to be about half of retail sales at list prices. This assumption is supported by the prices the surveyed record firms reported charging for their various types of recordings.

Resall sales figures are from RIAA. They are based on sales at list prices. Because sales are commonly made at a signale discount these days, actual retail sales are about 20-25% lower than the figures given.

SOUNCE: CRI surveys of recording companies are described in Exhibit S.D. The actual statistics reported by the surveyed companies appear in the Technical Appendix. The figures supplied by these companies are for their U.S. operations only

Alaciules depreciation.

Exhibit 5-8 -

ESTIMATED FINANCIAL STATISTICS FOR THE RECOMPLIES INDUSTRY, 1967-1974 Percentages of Not Sales

1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1974 1975 1974 1975 1974 1975 1974 1975 1974 1975 1974 1975 1974 1975 1975 1974 1975 1975 1976			1973 Survey Statistics and Updates in 1974 and 1975								
2. Talent Costs 3. Recording Expenses 4.21 (4.23 3.84 3.64 4.05 4.05 4.05 4.05 4.05 4.05 4.05 4.0		1965	1966	1947	1968	1969	1970	1971	1972	1973	1974
3. Recording Expenses 4. Artists' Roysities 14.11 13.53 14.65 15.93 18.78 18.78 19.55 19.28 5. Yotal Artist & Recording Expenses (19-23-46) 6. Production & Hanufacturing 7. Sales, Promotion, General & 29.55 30.05 27.28 27.05 26.95 28.85 26.28 8. Total Costs Other than Mechanical Roysities and Profits (56-67) 9. Copyright Mechanical Roysities 10. Total Costs (20-9) 11. Profits from Recording Sales Refore Taxes & 7.65 19.28 12. Nat Sales (10-11) 13. Foreign fer Income, etc. 14. Profits Before Taxes & 5.66 19.18 15. Income Taxes 16. Nat Profits After Taxes 17. A 10. Total Costs After Taxes 18. Total Costs After Taxes 19. Sales (10-11) 15. Recording Sales Recording Sales Refore Taxes & 7.65 19.28 16. Nat Profits After Taxes 19. Sales (10-11) 15. Recording Fer Income, etc. 16. Nat Profits After Taxes 17. A 10. Total Costs After Taxes 18. Total Costs After Taxes 19. Sales (10-11) 19. Sal	1. Contribution to Artists' Funds			1.91	1.91	1.71	1.4%	1.85	1.51	1.75	2.0%
3. Recording Expenses	2. Talent Costs	<u> </u>		2,51	2.0%	2.0%	1.85	2.0%	2.0%	3.31	1,5%
5. Yotal Artist & Recording Expenses (1-2-3-4) 6. Production & Manufacturing 7. Sales, Production & Manufacturing 7. Sales, Production & Manufacturing 8. Total Costs Other than Mechanical Royalties and Profits (S:6-7) 9. Copyright Mechanical Royalties 10. Total Costs (8-9) 11. Profits from Recording Sales Sefore Taxes & Foreign Fees, etc. 12. Net Sales (10-11) 13. Foreign Fee Income, etc. 14. Profits Before Taxes (11-13) 15. Income Taxes 16. Net Profits After Taxes 7. Sales According Firms Retail Sales of All U.S. Recording Firms Retail Sales Alust Prices U.S. Sales	3. Recording Expenses		Ι.	4.25	4.21	3.84	3.8%	4.03	4.01	4.31	3.21
Expenses (10-23-4) 6. Production & Hanufacturing 7. Sales, Promotion, General & 29.51 30.01 27.24 27.04 26.94 27.84 28.74 30.35 8. Total Costs Other than Hechanical Royalties and Profits (See ⁶ 7) 9. Copyright Nechanical Royalties 9.18 8.70 85.44 82.34 83.44 87.07 86.34 90.81 88.35 (See ⁶ 7) 9. Copyright Nechanical Royalties 9.18 8.78 8.18 8.26 8.78 8.18 7.64 7.24 10. Total Costs (8-9) 11. Profits from Recording Sales Refore Taxes & Foreign Fees, etc. 12. Net Sales (10-11) 13. Foreign Fee Income, etc. 14. Profits Refore Taxes (11-13) 15. Income Taxes 16. Net Profits After Taxes 16. Net Profits After Taxes 17. 8 10 12 13 13 13 13 15. Estimated & of Industry Represented Records 18.	4. Artists' Royalties			14.15	13.51	14.61	15.9%	18.7%	18.7%	19.5%	19,21
7. Sales, Promotion, General & Administrative Expenses 2 29.51 30.05 27.25 27.05 26.95 27.85 28.75 30.35 8. Total Costs Other than Mechanical Royalties and Profits (Scén') 9. Copyright Mechanical Royalties 9.15 8.75 8.15 8.25 8.75 8.15 7.65 7.25 10. Total Costs (409) 9.15 8.75 8.15 90.45 91.45 95.75 94.45 98.45 95.55 11. Profits from Recording Sales Before Taxes & Foreign Fees, etc. 3.95 5.85 9.65 8.25 4.35 5.55 1.65 4.55 1.65 4.55 1.67 7.25 12. Net Sales (10-11) 100.05 1				22.71	21.6%	22.11	22.91	26.51	26.21	28.81	26.24
### ### ##############################	6. Production & Manufacturing	1	1	34.81	33.41	33.0%	33.74	33.6%	32.34	33.31	31.8%
Signature Sign	7. Sales, Promotion, General & Administrative Expenses			29.5%	30.0%	27.2%	27.0%	26.94	27.8%	28.7%	30.3\$
10. Total Costs (8-9)	ital Royalties and Profits			87.0%	85.44	\$2.34	\$3.41	87.0%	\$6.38	90.8%	44,31
11. Profits from Recording Sales 3.9% 5.8% 9.6% 8.2% 4.3% 5.5% 1.6% 4.5% 12. Net Sales (10-11) 100.0% 1	9. Copyright Mechanical Royalties		_ ·	9.1%	8,7%	8.14	8.2%	8.7%	8.14	7.6%	7.21
Refore Taxes & Foreign Fees, etc.	10. Total Costs (8+9)			96.11	94.11	90.41	91.45	95.74	94.41	98.41	95.51
13. Foreign Fee Income, etc.				3.91	5.84	9.61	\$.21	4.31	\$,5\$	1.61	4.51
14. Profits Sefore Taxes (11-13) 2.10 14.51 13.74 9.94 11.63 7.84 13.05 15. Income Taxes 3.94 5.45 7.65 6.94 4.95 5.95 4.41 6.05 6.05 6.85 5.05 5.94 5.05 6.05	12. Met Sales (10+11)			100.01	100.0%	100.0%	100.0%	100.05	100.01	100.01	100.0%
11-13 15. Income Taxes 3.94 7.65 6.95 4.95 5.95 4.45 6.05 6.85 5.05 5.95 4.45 6.05 6.85 5.05 5.95 6.95 6.85 5.05 5.95 6.95 6.85 5.05 5.95 6.95	13. Foreign Fee Income, etc.b	l	Ì	4.25	4.91	4.9%	5.5%	5.61	6.31	6.21	6.51
16. Net Profits After Taxes 4.2% \$.2% 6.9% 6.8% \$.0% \$.9% \$.4% \$.0% Rumber of Reporting Firms Estimated % of Industry Represented 52.0% 63.0% 62.0% 60.7% \$6.8% 63.8% Estimated Sales of All U.S. Recording Firms ([smillion]) Records Tapes - 8.862 2 959 \$1,051 \$1,124 \$1,170 \$1,182 \$1,251 \$1,385 \$1,456 \$1,550 \$122 234 416 478 493 \$541 \$541 \$541 \$650				8.1%	10.7%	14.5%	13.74	9,91	11.65	7.8%	13.0%
Mamber of Reporting Firms	15. Income Taxes	l	ł	3.94	Ø 5.4%	7.6%	6.9%	4.9%	5.54	4.45	6.0%
Estimated % of Industry 44.0% 45.0% 52.0% 63.0% 62.0% 60.7% 58.8% 65.8%	16. Net Profits After Taxes			4.21	5.2%	6.91	6.81	5.0%	5.91	3.41	5.0%
Estimated % of Industry 44.0% 45.0% 52.0% 63.0% 62.0% 60.7% 58.8% 65.8%	Number of Reporting Firms			,	•	10	12	13	13	13	13
U.S. Recerding Fires \$546 \$479 \$793 \$830 \$872 \$962 \$1,008 \$1,100	Estimated & of Industry			44.03	43.0%	52.01			- 1		
Records \$862 \$959 \$1,051 \$1,124 \$1,170 \$1,182 \$1,251 \$1,383 \$1,436 \$1,550 \$100 \$1	U.S. Recording Firms			\$546	\$679	\$793	\$\$30	\$872	\$962	\$1,006	\$1,100
Tapes - H.A.º 50° 122 234 416 478 493 541 581 650	Retail Sales At List Prices d (\$millions)									,	
!	Records		2 959	\$1,051	\$1,124	\$1,170	\$1,182	\$1,251	\$1,585	\$1,434	\$1,550
Total \$862 51,009 \$1,173 \$1,358 \$1,586 \$1,660 \$1,744 \$1,924 \$2,017 \$2,200	Tapes ·	H.A.*	50°	122	234	416	478	493	541	581	650
	Total	\$862	51,009	\$1,173	\$1,358	\$1,586	\$1,660	\$1,744	\$1,924	\$2,017	\$2,200
\$ Change From Previous Year +13.75 -17.15 +16.35 +15.85 +16.85 + 4.75 + 5.15 +10.35 + 4.85 + 9.15	♦ Change From Previous Year	+15.7%	-17.1%	+16.34	+15.84	-16.8%	+ 4,7%	• 5.19	-10.3%	+4.81	+ 9.1%

ancludes depreciation.

48

broreign fee income and other miscellaneous income are not included in net sales. Foreign fee income is from the licensing of U.S. record masters for pressing overseas, and is estimated to be roughly one-half of the total figure shown. The remainder is from domestic fees from record and tape clubs, inventory adjustments, other one-time items, interest, and rent. They are expressed as a percentage of net sales to show how much they contribute to the profits recording firms make on their recording sales.

Cascording Company sales are estimated to be half of retail sales at list prices. This estimate is supported by the prices the surveyed record companies reported charging for their various types of recordings.

Retail sales figures are from RIAA. They are based on sales at tist prices. Since sales are usually made at a sizable discount, actual retail sales are about 20-25% lower than the figures gives.

^{*}Tapes scies began to develop in 1965 and were becoming significant in 1966. The/1966 figure is an estimate by CRI. No RIAA figures on tope sales are available before 1967.

Source: CRI surveys of recording companies are described in Exhibit S-D. The actual figures reported by the surveyed companies appear in the Technical Appendix. The figures supplied by the companies are for their U.S. operations only.

Exhibit 5-C ESTIMATED INCOME STATEMENT OF THE U.S. "SCORDING INDUSTRY, 1967-1974

				M	Illeas of	follars			
	•	1967	1963	1969	1970	1971	1972	1973	1974
1.	Contribution to Artists Funds	\$ 11.1	\$ 13.0	\$113.7	\$ 12.1	\$ 15.5	\$ 14.3	\$ 17.1	\$ 21.0
2.	Talent Costs	14.5	13.7	15.6	15.2	17.6	18.9	33.8	19.
3.	Recording Expenses	24.5	28.1	30.0	31.6	35.6	34.9	43.0	35.
4.	Abelists' Royaliles	82.0	91.2	115.0	131.4	165.2	179.6	196.1	211.
s.	Total Artist and Recording Expenses (1-2-3-4)	\$132.3	\$146.0	\$174.4	\$190.3	\$233.9	\$251.7	\$ 290.0	\$ 287.
6.	Production & Kerufacturing	203.0	228.4	260.0	,278.6	297.4	310.5	335.4	350.
7.	Selling, Promotion, Administrative (General Expenses	172.3	202.3	,214.8	223.6	238.2	267.3	219.3	333.
ŧ,	Total Costs Other Than Fechanical Royalties and Profits	\$507.5	\$\$76.7	\$649.2	\$692.5	\$769.5	\$830.0	\$ 914.6	\$ 971.
9.	Copyright Suchanical Royalties (5+6-7)	52.7	53.6	63.7	67.6	77.3	7¢.1	77.1	79.
0.	Total Costs (8+5)	\$560.2	\$635.3	\$712.9	\$760.2	\$846.8	\$908.1	\$ 991,7	\$1050.
11.	Net Profits on Recording Sales Before Taxes & Foreign Fers, etc.	22.3	. 38.8	75.6	67.1	38.4	52.9	16.5	49.
12.	Net Sales (10+11)	\$582.7	\$674.6	\$788.7	\$827.3	\$885.2	\$961.3	\$1098.3	\$1100.
3.	Foreign fee incese, etc.	.24.5	32.8	38.7	45.7	49.5	60.8	62.5	71.
14.	Ket Profit Refore Incoce Taxes (11-15)	47.0	71.6	114.2	112.9	88.1	113.7	79.0	121.
15.	Income Taxes	22,7	36.7	60.0.	57.6	43.9	\$6.7	44,4	65.
16.	het Profit Af er Incote Taxes	6 24.5	\$ 34.9	\$ 54.4	\$ 55.4	\$ 44.2	\$ 57.0	\$ 54.7	\$ 55.
	Estimates Based on Statistics from This Number of Reporting Companies	,		10	12	13	13	13	,
	Estimated V of Industry Sales Represented by Reporting Companies *	44.01	\$3.01	52.03	63.01	62.03	60.71	36.11	63.1

^{*}Includes depreciation,

The 1973 figure is based on statistics supplied by 13 companies with about 57% of the industry's sales, as for the 1974 figure, the same 13 companies had 64% of the industry's sales in that year. Statistics supplied in response to an additional questionaire by 34 companies with 98% of the industry's 1973 sales indicate that 1973 mechanical royalities paid were closer to 382 i million, and, for 1974, closer to 835.5 million. These figures co not include mechanical royalities paid to U.S. copyright holders by foreign record companies or by foreign subsidiaries of U.S. record companies. Foreign mechanical royalities grew rapidly. In 1973, they were approximately 35% million, or nearly 50% of the mechanical royalities paid by U.S. recording companies and other copyright owners is more than five times the royalities estimated to have been paid in 1983. The 1973 estimate is based on millboard reports about sales abroad of recordings of U.S. music.

Foreign fee income and other miscellaneous income are not included in net sales. Foreign fee income is from the litensing of U.S. . record masters for pressing overseas, and is estimated to be roughly one-half of the total figure shown. The remainder is from domestic fees from record and tape clubs, inventory adjustments, other one-time items, interest, and rent. They are expressed as a percentage of met sales to show how much they contribute to the profits recording firms make on their recording sales.

dincome taxes include state as well as federal tares.

Estimates of the % of industry sales represented by the surveyed companies are based on the assumption that industry sales are about half retail sales at list praces as reported by https://doi.org/10.1002/j.com/nits-sumption is supported by the prices the surveyed companies reported charging for their various types of recordings. These figures almost surely overstate, the profits of the recording industry, for they are based on statistics supplied by larger companies whose profit levels are generally far higher than those of t multitude of small companies not encompassed in the CRI survey. These profit figures are only for the U.S. operations of vectord companies, they do not include the profits of foreign subsidiaries.

NOTE: Totals do not always add precisely because of rounding. The figures here are only for the U.S. eperations of the record companies. Figures for their foreign subsidiaries are not included.

SOURCE. CRI's 1973, 1974 and 1975 surveys of leading record companies. For details of survey see Technical Appendix. The statistics here are the sum of the actual figures reported by the companies surveyed divided by the estimated percentage of the industry's sales these companies had.

50

Sources for This Exhibit

Cost and profit data contained in Exhibit 5 (and several other exhibits) are based upon a 1973 survey conducted by the Cambridge Research Institute, and opdated in 1974 and 1975. The survey obtained data from ten'companies for 1909, increasing to 13 companies for 1971-1974. In 1909, these ten companies accounted for about 52% of the total industry sales, the 13 companies reporting data for 1971-1974 accounted for between 57% and 62% of the total industry sales during those years. The ten companies reporting data in 1999 are included in the sample companies through 1974. A few companies—150 reported data for 1905-1968, however, too few companies reported 1905 and 1900 data for any meaningful canalysis to be made. Secure of the somewhat larger mambers of companies and because of the somewhat larger percentages of the shole industry represented by them the firm es for the years 1900-1904 and 1970-1974 justify somewhat greater statistical confidence than the data for 1955-19% and 1907-1968. The 13 or mainles which provided the 1971-1974 financial data shown in this section of the presentation are listed below.

ABC/Dunhill
Atlantic
Buddah
Capitol Records
CBS Records
CBS Records
CBS Records
Inc.
BCA
London Records, Inc.
BCA
Plomogram (formerly Hercury)
Polydor
RCA
Karner Bros. Records, Inc.

These 13 companies represent 16 companies surveyed by John D. Glorer in 1965 for his report before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. House of Representatives, 87th Congress, First Session. NCA is more the group name for Decce, Eupp, and Uni; ARC/Dwaltil is a consolidation of those two compani.

the questions asked in the 1973, 1974, and 1975 surveys were similar to those used in the 1965 Glover survey. The data were collected and put on a computer by J.K. Laiser & Co., CPA's. The estimates of the percentage of industry sales represented by the reporting companies were based on the camenty accepted estimating convention that industry sales were about half of retail sales of recordings at list prices as reported by \$1AA.

The Technical Appendix contains a copy of the 1973 questionnaire, the instructions for filling out this questionnaire, and a copy of the 1975 questionnaire. The 1974 questionnaire is not included since it was virtually identical with that of 1973. The instructions for filling out the income statements in the 1975, 1974, and 1975 surveys were identical in order to insure comparability of the data.

Additional Data Based on Sample of 34 Companies

In the interest of obtaining as accurate information as possible concerning mechanical royalties paid to the publishing industry by the recording industry, Cambridge Research Institute solicited the cooperation of a larger number of companies than had responded to its earlier, more extensive questionnaire.

Statutory License Royalties Paid by U.S. Record Hukers in 1973 and 1974.

The 34 companies that responded to the questionnaire accounted for about 94% of industry sales in 1973 and probably more than that in 1974. On the basis of this data, further estimates of mechanical royalties paid in 1973 and 1974 were obtained as follows:

. 1973 1974 (\$ millions)

\$83.5

Hechanical royalties paid by 34 record makers \$80.4

Hechanical royalties paid by all U.S. record makers (estimated)² \$82.1 \$83.5

These estimates of mechanical royalties paid by the industry resulting from this survey are higher than the estimates from the 13-company financial survey conducted by CRI and reported elsewhere in this report, e.g., Enhibit 5-C. The estimates above are probably more accurate because the sample is larger. See the Technical appendix for a description of the 34-company survey.

[&]quot;The mechanical royalty payments of the 34 reporting companies were used to estimate industry totals by relating the reported sales of the 34 companies to industry total sales as provided by RIAA annually.

ever, actual retail dollar sales are probably about 75% to 80% of those "list" figures.

- Increase in Record Prices and Relationship to Profit. Although the suggested list price for regular price albums has been raised several times in the last decade, these increases are heavily discounted at retail. The increases in the prices which consumers actually pay have not offset the effects of inflation, nor have they resulted in high profits for the recording industry. BLS figures for actual prices paid by the consumer for a typical LP were \$4.25 in 1964 and \$4.74 in 1974, an increase of only 11.5%. (The CPI rose 59% during these years.) Recording industry pre-tax domestic profit margins from these sales rose from 2.1% in 1964 to 4.5% in 1974, still well below the norm for American industry:
- of record makers rose from something like \$138 million in 1955 to something like \$1.1 billion in 1974. Profits of recording companies from all sources, including rentals and interest, rose from something like \$21 million in 1955, to something like \$121 million in 1974.
- Growth in Incomes to Copyright Owners. In this same period of 1955 to 1974, mechanical royalties paid to publishing companies and other copyright owners rose from something like \$22.1 million in 1955 to \$79.3 million in 1974. The additional rise in, and the impressive amounts of income derived by copyright owners from performance fees have already been brought out.
- A Growth Industry. Clearly, the recording industry has been a growth industry over the past 20 years.

Let us now examine more closely who has benefited from this growth, and by how much.

The Revenues, Costs, and Profits of the Recording Companies.

The revenues of recording companies have grown with only a few set-backs -- as in 1960 -- since 1955. Their profits, however, have fluctuated widely. Some years are better than others in terms of absolute dollar profits as well as margins. The recording industry does not always reap high rewards for the ingenuity and capital it has invested in improving the technology the musical quality, and the marketing of records. Its profits are uncertain. It is a risky industry, in total, and record by record.

Over the years, the recording companies have been deriving an increasing share of their profits after taxes from the licensing of U.S. made masters to foreign record companies for manufacture and distribution abroad. These gains amount to about one-half of the "other income" obtained by the recording industry. In recent years fees from foreign recording companies for use of U.S. recording masters have fluctuated from a high of something like 4.8% of record company sales in 1969 to a low of 0.8% in 1973. Similarly, recording companies derive important revenues from rentals -- of recording studios and equipment, for instance -- and interest -- on accounts receivable, for instance.

The costs of recording, manufacturing, and marketing -- and of mechanical fees -- also fluctuate and vary over time, as do the successes of the recorded offerings of the industry. It is for these reasons that the profits of record makers fluctuate widely, as they do.

Over the past 4 years, two that were good and two that were somewhat poorer, the earnings of the recording industry from records, before taxes, can be summarized as follows:

	Profits From Recording Sales, Before Taxes & Foreign Fees, etc. (\$ million)	Foreign Fee Income* (\$ million)	Total (\$ million)	As Percent of Record- ing Sales
1971	\$38.4	\$24.8	\$63.2	7.1%
1972	32.9	30.4	83.3	.8.7
1973	16.5	31.3	47.8	4.7
1974	49.8	35.8	85.6	7.8
+ years	\$157.6	\$122.3	\$279.9	7.1%
H P		·		

In addition, the industry had profits before taxes from income sources other than making, manufacturing, and selling records. If an amount about equal to foreign fee income. (Profits after taxes, o ourse, were much less than the indicated pre-tax profits -- probably something like half. or less.)

Income to Copyright Owners from Records

Copyright owners are in a position somewhat similar to that of preferred stockholders when it comes to income from records: -- their mechanical fees get paid, record by record -- or, rather, license by license -- irrespective of whether individual records, or record makers make any money or not. With only one set-back, in the very poor year of 1973, mechanical royalties going to publishing companies have increased every year since 1967. Going back still faither, mechanical royalties have increased every year since the mid 1950's, excepting, our data shows, only the year 1962.

In summary, the mechanical royalties paid by the recording industry to the publishing industry over the past four years have been as follows:

^{&#}x27;Estimated at 50% of other income.

	Mechanical Royalties (\$ million)	As Percent of Record Company Sales (%)
1971	\$77.3	8.7%
1972	78.1	8.1
1973	77.1	7.6
1974	79.3	7.2
years	\$311.8	7.9%

The percentage of the recording industry's revenues from records that goes to the publishing industry averages more than the before-tax profit that goes to the record makers! Over the past 4 years, an average of 7.9% of revenues has gone to the publishing industry as compared to 7.1% of pretax profits to record makers. In dollar terms, mechanical royal ies paid to the publishing industry over the four years came to \$311.8 million as compared to the pre-tax profits to the recording industry from records of \$279.9 million.

It would be interesting to compare the net profits after taxes which the two industries derive from records. The net profits after taxes for the recording industry are estimated in Exhibit 5. Unfortunately, the publishing industry has refused to provide the necessary data despite requests from Congress. In the absence of such disclosure, the best that can be done is to compare mechanical royalties before taxes with record companies' profits from records, also before taxes. Actually, the comparison is not at all unreasonable: The publishing companies incur little or no expenses in connection with recorded music other than to collect the mechanical royalties. Even more important, the comparison completely sets assor the very large personmance fees the publishing industry lerives from recorded music. Again, about the only cost incurred in that connection is the collection of the fees.

Taking into account both mechanical royalties together with performance fees from records -- which are certainly not less than one-half of the dollar value of mechanical royalties and probably considerably more than that -- the publishing industry derives considerably greater dollar benefits from records than does the recording industry, itself.

Contribution of the Music Publishing Industry to Recorded Music

It is not unreasonable to inquire into the contribution of the music publishing industry to the creation, production, risk-taking and marketing of recorded music. The point need not be labored: No one who loves musical experiences would wish to downplay for a moment the importance of tunes, compositions, and the unique contributions of composers. Equally, however, it is clear that the success over the past twenty years and growth of recorded music is attributable in large measure to unique performances; to arrangements; to accompaniment; to advances in electronic technology and recording artistry; to marketing; to innovation and risk-taking by record makers and to their marketing efforts, including very large outlays for advertising, designed to bring new recordings to the attention of music-loving publics.

Conclusion

There is no obvious reason of justice or of economics for Congress, by legislation, to attempt to increase -- by almost 60% -- the share of the proceeds of record sales going to the music publishing industry -- which includes music publishing companies, other copyright owners, and composers. There is no more economic reason for Congress to attempt to increase that particular share of record revenues than the share of any of the other parties and are surely no less deserving in light of their unique contributions to recorded music. But that is what Section 115 of H.R. 2223 would do.

This conclusion must be reinforced by the fact that publishing companies and other copyright owners are ilready deriving more of the total genefits from recorded music -- including performance fees from commercial use of records -- than the recording industry tiseif.

- II. THE IMPACT OF AN INCREASE IN THE STATUTORY MECHANICAL ROYALTY
 - A. THE 3¢ RATE WOULD GIVE A LARGE AND UNJUSTIFIED WINDFALL TO COPYRIGHT OWNERS

If the statutory license royalty were increased to 3t, with a higher statutory rate for renditions over 4 minutes long, the average royalty per record would rise about 59%. Total license royalty payments would rise by amounts which would be enormous windfalls to the music publishing industry and a staggering burden to the record industry.

Although the income of music copyright owners from recordings has grown far faster than inflation, even under the provisions of the 1909 law, and even though copyright owners derive much more financial benefit from recorded music than recording companies do, themselves, a higher statutory royalty of at least 3¢ per tune has been written into the bill before you.

An increase in the statutory royalty from 2¢ to 3¢ does not sound like very much. However, this seemingly trivial "penny increase" would have a major impact on the earnings of the music, the publishing industry and other copyright owners, on the prices consumers pay for recordings, and quite likely on the amount and kind of music recorded.

In the first place, raising the nominal statutory rate from 2¢ to 3¢ represents an increase of 10¢. The actual increase would be considerably larger, for H.R. 2223 calls for payment to the copyright owner of not just 3¢ per tune, but of 3¢ per tune, or 3/4¢ per minute of playing time, or fraction thereof, for each tune, whichever so reater. Thus, a composition running four minutes or less would incur a late of 3c. But a piece lasting more than four minutes would be subject to an added cost: a "5-minute" tune would call for a rate of 3-3/4¢; a "5-minute" tune would call for 4-1/2¢; a "7-minute" tune would call for payment of 5-1/4¢; and an "9-minute" tune would call for 5¢, and so on. The proposed rate based on playing time is something new; that concept is not provided for in the existing copyright law. The proposed rate is a substantial increase over the sudespread current roluntary industry practice or paying 1.2c per minute of a tune's playing time over five minutes.

To study the impact of the "3¢ rate" on the typical hit record and on the recording industry, an analysis was made of the Top 150 LP albums listed in <u>Billboard</u> magazine on March 3, 1973, selected as random illustration. Because some albums contained two records, a total of 165 records with 1,653 tunes were examined. If, for purposes of calculation, one assumes that the current statutory rate of 2¢ per license and released tune was paid, the average record in this sample would have called for a royalty of 20¢. If allowance is made for royalties currently paid in excess of 2¢ as a result of an additional "per minute" rate, the average mechanical royalty paid on the records in this sample is estimated to have been about 22¢.

The statutory royalty that, in contrast, would have been payable under the new rates proposed to this Subcommittee by the publishing companies was computed based on 3¢ per tune or 3/4¢ per minute of playing time, whichever was greater. By actual count, the statutory mechanical royalty for the average LP in this study, under the new provisions, would have been 35¢, an increase of 59% over the current rate. (See Exhibit 6).

What would this increase in the mechanical royalty rate mean in terms of its impact on the profits and revenues of the publishing and recording industries? Obviously, the answer would depend upon whether one were talking about a good or a poor year.

In Exhibit 7 some data are set forth which gauge what would have been the impacts of the proposed increase of mechanical royalty rates on the two industries in each of the past four years, 1971-1974, of which two (1972 and 1974) were good from the standpoint of recording industry profits, and two (1971 and 1973) were bad.

As shown in Exhibit 7, the dollar <u>increase</u> of the 59% hake in mechanical royalty sales would have ranged from a low of about \$45.5 million to a high of about \$46.8 million, for a total of about \$183.0 million for the four years. This would amount to an annual average of about \$46 million.

In terms of the cut which these increased royalties to the music publishing industry would have taken from the pre-tax profits of the recording indus-

Exhibit 6

STATUTORY LICENSE ROYALITIES PER TOP 150 LP ALBUMS
IN 1973 AT VARIOUS STATUTORY RATES²

	Royalty Per Record	Percentage Increase in Royalty Rate Over 2¢	Percentages Over 5 Minutes	of "Overtime" Over 4 Minutes
At 2¢ rate as presently paid	22¢	•	12.76%	
At 2-1/2¢ rate of H.R. 2512°	27 ¢	25%	12.76\$	-
At 3¢ rate of H.R. 2223	⁻ 35¢	59%		27.22\$

This analysis is based on the Top 150 of the "Top 200" LP albums listed in <u>Billboard</u> on March 3, 1973. Because some albums contained two records, a total of 165 records with 1,653 tunes were timed from the 1973 hits.

The 1909 copyright law specifies a statutory rate of 2¢ per selection but in recent years, record companies have generally adopted the practice of paying an additional amount of 1/2¢ per minute of a tune's playing time over five minutes. This practice was taken into account in calculating the average of 22¢ per record.

The rate specifien in H.R. 2512, passed by the House of Representatives in 1967, was 2-1/2¢ per tune or 1/2¢ per minute of playing time, whichever is larger; hence, with this rate, an additional amount over 2-1/2¢ would be paid for any tune with a playing time over <u>five</u> minutes.

The rate specified in S. 22 and H.R. 2223, the oills currently before the Congress, is 3c per tune or 3/4c per minute of playing time, which ever is larger; hence, with this rate, an additional amount over 3c would be paid for any tune with a playing time over four minutes.

Exhibit 7

FINANCIAL IMPACTS OF PROPOSED INCREASED MECHANICAL ROYALTIES ON MUSIC PUBLISHING INDUSTRY AND RECORDING INDUSTRY, 1971-1974

	Estimated Actual Nechanical Royalties (\$ Million`*	Estimated Estimated Increase Actual in Mechanical Royalties Due to Royalties "3¢ Rate" (\$ Million * (\$ Million)	Increase, as fotal Percent of Estim Mechanical anica Royalties After (Percent) (\$ Mil	Figure 1 Nechanical Royalties After Increase (\$ Million)*	Estimated Recording Industry Pre-Tax Pro-fit From All Sources Before Increased Royalties (\$ Nillion)*	Estimated Recording Industry Pre-Tax Pro- fit.From All Sources After Increased Royalties (\$ Million)	Increased Mech- anical Royalties as % of Record Industry Pre-Tax Profits From All Sources (Percent)
1971	\$77.3	\$45.6	59.0	\$122.9	\$ 88.1	\$ 42.5	51.8
1972	78.1	46.1	59.0	124.2	113.7	,67.6	40.5
1973	77.1	45.5	\$9.0	122.6.	79.0	33.5	57.6
1974	79.3	46.8	59.0	126.1	121.3	74.5	38.6
4 year	4 years \$311.8	\$184.0	59.0\$	\$495.8	\$402.1	\$218.1	45.5\$

* See Exhibit 3, note "a".

try, these increased royalties would have represented not less than 38.6% of the pre-tax profits, from all sources, of the whole recording industry (in 1974) up to as much as 57.6% (in 1973). For the four-year period, including the two good years and the two bad, the increased royalties would have taken 45.5% of the entire recording industry's pre-tax profits from all sources.

In dollar terms, the increase in royalty rates would have taken an average of about \$46 million a year over the four-year period from the recording industry total of \$184 million) and given that money to the music publishing industry. The publishing industry's "take" from mechanical royalties would have been increased from an annual average of about \$78 million to an average of about \$124 million. This would have represented an increase in average mechanical royalty income of about 59%.

The aggregate pre-tax profit of the recording industry from all sources for the four-year period would have been reduced by the same \$184 million, from a figure of about \$402 million to about \$218 million. In terms of an annual dollar average, the pre-tax profit of the recording industry would have been reduced from about \$100 million to \$54 million.

Those figures of impact on pre-tax profits of the recording industry relate to pre-tax profits from all sources, including foreign fees for records made abroad from U.S.-made masters -- on which foreign mechanical royalties were paid to U.S. copyright owners by foreign record companies -- together with income from studio rentals, interest, etc... This impact could also be compared to pre-tax profits on records made and sold in the United States, because it is to these records that domestic mechanical royalties relate. The following figures, shown in Exhibit 3, make that comparison with actual mechanical royalties at the "2e Rate" and with the royalties that could have bee payable at the "3c Rate".

As is shown clearly in Exhibit 3, the proposed <u>increase</u>, alone, in the mechanical royalties on records made and sold in the United States during the years 1971-1974 would have averaged 115% of the pre-tax profits samed by the tecording industry on those records. The mechanical royalties, under the

Exhibit 8

MICHARICAL ROYALTIES COMPARED TO RECORDING INDUSTRY PRE-TAX PROPITS - FROM RECORDS MADE AND SOLD IN THE UNITED STATES, 1971-1974

	Recording Industry U.S. Pre-Tax Profits Tron Records*	Mechanical Royalties on Those Records at	Proposed Dollar Increase in Royalties	Mechanical Royalties on Those Records at Proposed "3¢ Rate"**	Proposed Increase in Mechanical Roy- alties as % of Re- cording Industry
	(Millions)	(Millions)	(Millions)	(Millions)	Pre-Tux Profit from Records (Percent)
19/1	. \$38.4	\$77.3	\$45.6	\$122.9	118.8\$
7/61	6.2.9	.78.1	46.1	124.2	87.1
3/61	16.5	77.1	45.5	122.6	275.8
1:3/4	a, 9.	79.3	46.8	126.1	94.0
t years	\$157.6	\$311.8	\$184.0	\$495.8	116.18

proposed "3¢ Rate", including the increase, would have averaged 315% of those pre-tax profits. This would compare to the actual royalties at the "2¢ Rate", which, in fact, averaged 198% of the pre-tax profits of the recording industry on records made and sold in the United States.

In other words, whereas mechanical royalties were about twice the profits before taxes which recording companies derived from records made and sold in the United States, the royalties under the "3¢ Rate" would be over three times those pre-tax profits.

In the foregoing paragraphs, we have been speaking of the recording industry as a whole. One can assume -- correctly -- that some record makers are more profitable than others. The impact of the increased mechanical royal ies on averagely profitable recording companies would have been staggering -- an average of 46% of their pre-tax profits from all sources over a four-year period. For a less profitable firm, the impact would have been disastrous.

What is at issue is not a "mere penny" increase, but a transfer of a major amount of money from one industry to another. Given, as we have seen, the relative contributions of the two industries to recorded music, and the financial benefits they derive respectively from recorded music, this transfer would be a major, unearned windfall for the one and a major -- a staggering -- burden for the other.

- II. THE IMPACT OF AN INCREASE IN THE STATUTORY MECHANICAL ROYALTY (CONT'D)
 - B. THE HIGHER STATUTORY RATE COULD COST CONSUMERS NEARLY \$100 MILLION

The increase in the statutory license rate could cause a 6.1% increase in the price consumers pay for recordings and thus could cost consumers nearly \$100 million.

A \$46 million average annual increase in mechanical royalty payments would consume almost one-half of the pre-tax profits from all sources of U.S. record makers, if their other costs and their prices remained unchanged. If not passed on to consumers, such an increase in royalties would wipe out 94% of the \$50 million in pre-tax profits which the U.S. recording industry realized in 1974 from recording sales, before foreign fee income and other miscellaneous income. And 1974 was a good year for the industry in terms of those profits. In the years 1971 and 1973, the proposed increase, alone, in the mechanical royalties would have been greater than the pre-tax profits from those records.

Obviously, the record makers could not absorb such a substantial increase in their costs. The profits simply haven't been there. To protect themselves, they would be under pressure to take defensive measures. Several possibilities come to mind: an increase in prices; fewer bands on average record; reduced overtime royalties on tunes; more public domain music; reduction in number of tunes used and releases put out; reduction in the number of more innovative and riskier releases. These are just a few of the possibilities. In the event of an increase such as proposed, the several record makers would take a variety of defensive actions, in various combinations and proportions, according to their several judgments of how bost to protect themselves and their interests.

The most obvious defensive action -- although not necessarily the most likely or most practical measure -- would be for recording companies to increase their prices to the trade. The distributors buying the wares of record makers, in turn, could be expected to pass any price increase along to retailers, who then would charge a higher price to consumers. At each stage in the distribution chain, not only would the higher license royalty

need to be passed on, but the higher operating costs generated by the royalty increase would be passed on, too. For example, with higher prices for recordings, the dollar cost of marketers' inventories would rise and, with it, the cost of insuring and financing those inventories; the dollar investment in accounts receivable would increase; the dollar loss on bad debts would rise; the tax base would rise, etc. All these additional dollar costs would have to be recovered, in addition to the direct increase in the cost of recordings due to an increase in the copyright royalty.

Thus, if the effect of the higher mechanical royalty were expressed solely in terms of higher prices, the cost to the consumers of a 3¢ rate would be far; far more than the \$47 million cost in 1974 to the record makers. At the consumer level is where the brunt of the statutory rate increase would be most widely felt.

In the case of popular LP's, Exhibit 9 illustrates how much prices to consumers could be expected to rise in consequence of a change in the statutory rate from 2¢ per selection to 2-1/2¢ per selection (or 1/2¢/minute of playing time) to 3¢ per selection (or 3/4¢/minute of playing time). Typical prices and gross margins along the line from recording company to independent distributor to distributor-serviced retailer to consumer are shown. Figures for rack jobber-serviced outlets would be similar.

As can be seen, the average price to a consumer of a popular LP* would go from \$5.77 to \$5.91 (with the 2-1/2¢ rate), or to \$6.12 (with the 3¢ rate). The \$5.91 price represents a 2.4% increase over the \$5.77 price, and the \$6.12 price represents a 6.1% increase.

Such an increase is, indeed, a substantial sum. Retail sales of recordings in 1974 were estimated to be \$2.2 billion at list prices. However, since most records are sold at about 3/4 of list price, consumers actually paid about \$1.7 billion for recordings. If allowance is made for recordings, non-copyrighted music, a 6.1% increase in retail prices could cost the amors

^{*}A common list price for a popular LP album is 36.96. The actual selling price to consumers is, on the average, 35.77. See ilso Exhibit 9, footnotes (d) and (e).

Exhibit 9

IMPACT OF A COPYRIGHT ROYALTY INCREASE GN CONSUMER PRICE

(illustrated for \$6.98 ilst irng playing hit record sold through indopendent wholesaires)

	24 Copyright Royalty	ht Royalty	244 Copyright Royalty*	t Royalty	34 Copyrite	34 Copyright Payalty
	Total	Amount of this Amount due to due to A 24¢	Amount due to A 214 royalty	Resulting in the following totals	Assumt- due to a 3¢ royalty	Resulting in the following
Record Maker's Cost of Goods	\$2.17	\$.22	\$.27	\$2.22	33. \$	3.5 \$2. TII
Record Myker's Average Gross Margin	1.16	77.7	\$1	. +1.19	• 19	11.23
Price to Distributor	\$3.33	\$34	\$.42	\$3.41	\$:54	\$3,51
Distributor's Margin	\$29	• .03	9.	8.	\$0. •	15.
Price to Retailor	\$3.62	\$.37	\$.46	\$5.71	65. *	\$3.84
Rotallor's Margin	•2.15	27:-7	12.1	+2.20	35.	12.28
Price to Consumer (if sold at discount)	\$5.77	\$.59	\$.73	\$5.91	5; *	
% of Consumer Price Due.to Copyright Royalty	10,	10.28	12.3N	1	15.43	•
# Increase in Consumer Price Royalty **Increase in Increase Consumer Price			\$0.14	4	36 n8 .	ļ

²214 par selection or 14 per minite of playing time, whichever is larger (rate specified in II.R. 2512, passed by the House of Representatives in 1967).

by per selection or 3/4¢ per minute of playing time, whichever is larger (the rate specified in il.R. 2223 and S. 22. currently being considered by the Congress).

"See Enhibit 6.

OCITY financial survey of eight major record companies indicated that in 1974 the average price at which in \$6.90 in was sold by the companies was \$3.33. There companies sold nearly \$7 million Li's at that price in 1971, which was the regular price for Li's in that year. Also, the average gross margin of these companies was \$35 of net "aleq, the resulting in an recage gross margin of \$1.16 per Li' sold. A company's gross margin must cover its welling and prowetion costs as well as its profits. (Source: The CRI financial survey of 13 record companies).

A \$6.96 ip record, on the average, is end to retailers for \$7.62 and is cold by retailers to consumers for \$4.77.

ŧE

BEST COPY AVAILABLE

nearly \$100 million. (See Exhibit 10). This would be a sizeable sum to load on the consumers just to provide copyright owners with a windfall gain which does not appear to be warranted.

As was pointed out a few moments ago, an increase in prices charged by record makers to the trade, and so on downstream to consumers, is only one of several possible effects of an increase in the statutory fee. No matter how the total effects of the increase might work themselves out --higher prices, fewer offerings, less innovation, fewer and/or shorter bands on LP albums -- the consumer, along with all other interested parties except copyright owners, would be affected very adversely. An estimated "cost" of \$100 million very inadequately expresses that burden.

Exhibit 10

COST TO CONSUMERS OF A 3¢ STATUTORY LICENSE RATE

Estimated 1974 retail sales of recordings, at <u>list prices</u> (RIAA estimate)	=	\$2.2 billion
Less: Average discount at which recordings are sold	#	\$0.5 billion
1974 Retail sales of recording at <u>actual</u> prices	, =	 \$1.7 billion
Less: Estimated sales of recordings with non-copy. righted music (6% of total)	, 3	\$0.1 billion
Actual retail sales affected by an increase in the statutory license royalty.		\$1.6 billion

If prices were raised 6.1% (from Exhibit 9) to cover the increase in the statutory license royalty, the cost to consumers would be:

\$1.6 billion x .061 = \$97.6 million

The Bureau of Labor Statistics reported that the average price paid for a \$5.98 LP in December 1973 was \$4.56. \$5.98 - \$4.56 = \$1.42, which is 24% of \$5.98.

billboard's International Buyer's Guide of September 14, 1974 estimated that 6.1% of record sales in 1973 were of classical music.

- II. THE IMPACT OF AN INCREASE IN THE STATUTORY MECHANICAL ROYALTY (CONT'D)
 - · C. THE HIGHER STATUTORY MÉCHANICAL RATE WOULD ALSO BE COSTLY TO JUKEBOX OWNERS

Increasing the statutory rate to 3¢ could cost jukebox operators \$6.57 per box per year.

If the increase in the statutory rate caused record makers to raise their prices, it would raise the cost of recordings not only to consumers, but also to jukebox owners.

Jukebox operators, as the Subcommittee well knows, purchase millions of dollars worth of records each year in order to provide access to current music for the listening public. Correspondingly they bear the cost of millions of dollars in copyright royalties. As can be seen in Exhibit 11, an increase in the statutory license to 3¢ would imply an additional cost to these operators of \$6.57 per box, a substantial increase in their costs. This impact, too, does not seem warranted.

Exhibit 11

IMPACT OF A COPYRIGHT FEE INCREASE ON JUKEBOX OWNERS

	Present Total Cost	Cost of .2¢ Rate	Cost of 3¢ Rate	New Total Cost Under 3¢ Rate ²
Cost to Record Maker of a 45 RPM Record	 \$0.36	\$0.04 ^b	\$0.05 ^b	\$0.38
Record Haker!s Average Hargin ^C	+ .19	+ .02	+ .03	+ .20
Price to Distributor	30. 55 ^d	\$0.06	\$0.09	\$0.58
Distributor's Hargin	+ .15°	+ .02	+ .03	+ .16
Price to Jukebox Owner of one 45 RPM Record	, \$0.70°	\$0.08	\$0.12	\$0.74
% of Jukebox Owner's Cost Due to Copyright Royalty	. 11.	.48	16.2\$	
Increase in Price Paid by Jukebox Owner Per Record to		i	\$0.04	
* Increase in Price Paid by Jukebox Omer Rate Increase	+5.7%		.7\$	
Average Annual Expenditures on Records Per Jukebox ²	\$115 \$121.57		21.57	
\$ Increase in Average Annual Expenditures			\$	6.57

With a 5¢ rate (specified in 5.22 and H.R. 2223 currently before Congress), a rate of 3/4¢/minute would be charged for every minute of a tune's playing time over four minutes. The calculations above are based on the assumption that no 45 RPM records purchased / jukebox owners would have more than four minutes playing time per tune. If any significant number of the tunes had a longer playing time, the increase in mechanical royalties at the 5¢ rate would be greater than the figures indicated above.

bSingles (45 RPM's) have artume on each side, or two tunes/record.

CCRI's financial survey of 13 leading record companies with 64% of the industry's sales indicated that in 1974 the average gross margin of these companies was 35% of net tales. The gross margin must cover a company's sales, promotional and administrative costs as well as its profits.

Statistics supplied by 13 leading record companies with 64% of the industry's sales indicated that in December 1974 the average price at which a record company sold its 45 RPM records was \$0.5475.

A RIAA survey of "one-step" distributors in early 1975 indicated that the average price at which they sold records to jukebox owners was 70c. Given footnote d, this indicates a gross margin of 21%.

[&]quot;The Jukebox Story", published by the Husic Operators of America in 1973, indicates that there are 400,000 to 500,000 jukeboxes in the country. Jukebox owners buy about 75 million records a pear at a cost of about \$52 million. If 450,000 jukeboxes are assumed to be in operation, then accord purchases cost on the average about \$115 per year per jukebox, and jukebox owners on the average purchase 107 records per year per jukebox.

- II. THE IMPACT OF AN INCREASE IN THE STATUTORY MECHANICAL ROYALTY (CONT'D)
 - D. THE HIGHER RATE MIGHT CAUSE RECORD MAKERS TO RECORD LESS MUSIC

To compensate for an increase in the statutory license rate, record makers might, among other defensive measures, record less copyrighted music and might put fewer tunes on a recording. To compensate for the reduction in their profits, they might reduce their recordings of classical and experimental music, on which they generally suffer losses. The higher license rate might eliminate some of the smaller marginal record makers. To the extent that these developments take place, there would be less diversity in the industry and in the recordings offered the public, less employment for musicians and performing artists, and fewer opportunities for new or experimental composers to get their music recorded.

If record makers passed on the substantial increase in license royalties which H.R. 2223 would exact, the higher prices charged consumers and jukebox owners for recordings would undoubtedly generate at least some, if not considerable buyer resistance. Sales of recordings might fall, and record makers would be under pressure to seek still further alternate strategies for coping with the \$47 million increase in their mechanical revalty payments, in order to minimize necessary increases in price at the retail level. Given their inability to absorb the increase out of profits, and still make a return commensurate with risk and investment, still further defensive measures would be sought.

What alternatative measures might a record maker take to ensure his survival if the statutory rate is increased so steeply?

1. Reducing the Use of Copyrighted Music

Faced with such a dramatic rise in their mechanical royalty payments, record makers might elect to reduce their use of copyrighted music. The most obvious way to reduce the use of copyrighted music is to reduce the number of tunes per record. As an alternative, this is not particularly attractive, but, in judicious combination with other defensive actions, this unfortunate step might have to be taken.

Some cutting down on the number of tunes on a recording has already occurred over the last 10 years. Record makers currently try to keep their mechanical royalties per LP down to a reasonable level. If the royalty for any tune is greater than the statutory rate because of its longer playing time, a record maker may tend to reduce the number of tunes on the recording in order to keep within his total budget for mechanical royalties on the recording. As can be seen in Exhibit 12, the average playing time per tune has risen a whole minute since 1965. This trend is related to changing tastes which enjoy more complex and sophisticated renditions and recordings of music. Record makers have compensated for this longer playing time and the resulting increase in the mechanical royalties per tune in part by cutting down on the number of tunes on an LP.

Because the copyright bill currently before Congress proposes to increase not only the royalty per tune but also to increase the playing time rate and to impose it on any tune longer than four minutes, record makers might try to hold down the playing time of tunes and try to keep as many as possible under four minutes. In sum, the increase in the statutory license rate may cause record makers to record fewer copyrighted tunes and to be more selective about the tunes they do record.

Efforts to reduce the use of copyrighted music on recordings would, of course, hurt publishing companies, composers and other copyright owners, for fewer of their tunes would be recorded. There would be fewer tunes earning mechanical royalties and performance fees from recordings. Popular established composers would still get their tunes recorded, no doubt, but the new tunesmiths and composers of experimental or classical music might face greater obstacles in gaining public exposure.

If the increase in the statutory license royalty caused record makers to put fewer tunes on LP's or tapes, fewer musicians and artists would be

Éxhibit 12.

	1965	1973	\$ Change 1965-1973
Tunes per LP	12 tunes	10 tunes b	- 16.6%
Average mechanical royalty per LP at rate of 2¢/tune	24¢	20¢° -	- 16,7½°
Average playing time per LP	33.01 minutes	37.47 minutes	+ 13.5%
Average playing time per tune	2.75 minutes	3.75 minutes	+ 36.0%

TUNES AND PLAYING TIME OF TOP 150 LP ALBUM RECORDS²

This analysis is based on the "Top 150" LP albums listed in <u>Billboard</u> on March 6, 1955 and the top 150 of the "Top 200" LP albums <u>listed</u> in <u>Billboard</u> on March 3, 1973. Only the 150 of the "Top 200" albums were studied in 1973 to provide direct comparison with the 1965 list, which consisted of only 150 albums. Because some albums contained two records, a total of 165 records with 1,653 tunes were timed from the 1973 hits.

bAlthough the Top 150 LP's analyzed averaged only 10 tunes per record in 1973, the "typical" LP must have around 11 numes. According to statistics reported by 8 record companies with about 51% of the industry's sales, in 1972 the average mechanical royalty per popular LP disk was 22.5¢ (at the 2¢ rate). If a flat license rate of 2¢ per tune were paid, this would indicate that the "typical" LP had 11.25 tunes (22.5 2 2¢). Some tunes do pay a license fee based on playing time, as indicated in footnote c below, but some tunes, being from the public domain, call for no copyright royalty at all. (These 8 record companies were among the 13 included in the CRI financial survey.)

Current practice is generally to supplement the 2¢ per tune rate with payment of 1/2¢ per minute of a tune's playing time over 5 minutes. Hence the actual royalty paid on the sample 1973 LP's probably averaged about 22¢ because of the long playing time of their tunes, and the decrease in the average royalty between 1965 and 1973 was only about 8%.

able to ger jobs making recordings, or would find themselves booking fewer recording hours. This would be unfortunate, for musicians' employment opportunities have already been reduced by the growing use of recordings rather than live music.

Reduction of the number of tunes on LP's and tapes would also be inflationary; to the extent that this alternative defensive action were adopted, the consumer would receive less music for the money spent on recordings.

In sum, raising the statutory mechanical rate may benefit popular established composers and their publishing companies and others who own or have an interest in the music of popular, established composers; but it would tend to hurt other composers, less well-known and younger and not yet recognized; it would also injure musicians and the American record buying public.

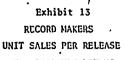
2. Reducing the Risks Inherent in the Business

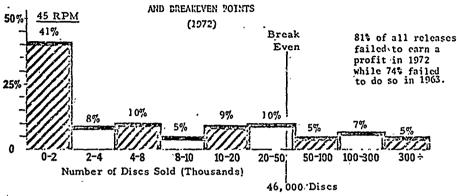
Another defensive measure record makers might take to keep a mechanical royalty increase from destroying their profit position would be to reduce their production of recordings which their judgment indicates are among the least likely to enjoy sufficient sales to cover their costs of recording production, and manufacture, and to make a profit.

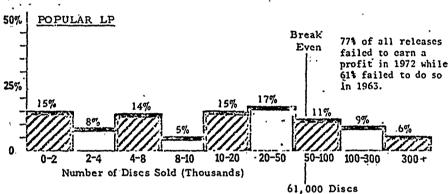
Eight out of ten recordings, even now, do not generate sufficient revenue to cover the cost of producing, manufacturing, and marketing them. (See Exhibit 13). In 1972, the latest year for which data on releases are available, 82% of "Singles" releases failed to earn a profit, as did 77% of popular releases, and 95% of classical LP's. Of popular LP's, 80% failed to break even; of classical tapes, 99% did not recover their costs.

The profits from the successful recordings -- a minority -- must cover the losses on the large number of recordings -- the large majority -- that do not sell well enough to cover their costs. Yet, regardless of whether or not the recording earns a profit, the publishing company or other copyright holder is paid its mechanical royalty. In financial terms, the mechanical









PERCENTAGES OF ALL RELEASES

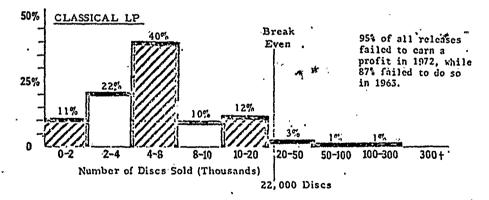
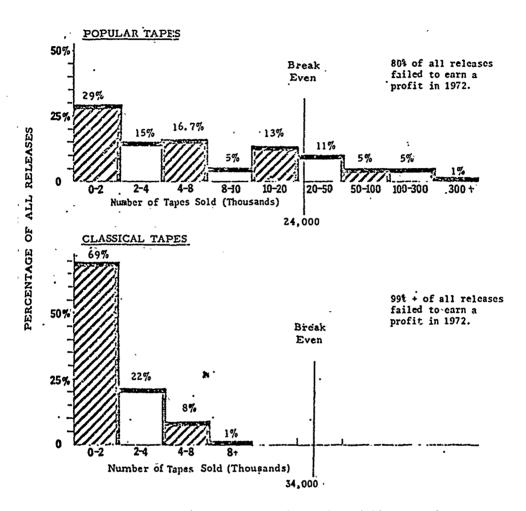


Exhibit 13 (continued)

Record Companies Unit Sales
Per Release and Breakeven Points (1972)



Source: Affinese figures are based on an analysis done by Cambridge Research Institute of a sample of the releases of eight record companies which had 51% of the industry's sales in 1972.

royal:, "comes off the top". The record maker bears the risk of loss, and this already very substantial risk would rise even further to the extent that the increase in the statutory license rate could not be passed on to consumers.

As the rigures in Exhibit 13 indicate, to break even on a 45 RPM single in 1972, a company had to sell, on the average, about 46,000 copies. In a year's time, over 80% of all single releases by record companies failed to reach the breakeven point. About 54% of the releases of all singles didn't even come close; they sold in amounts of 10,000 or less. The breakeven point has risen dramatically since 1963, when only 11,200 45 RPM discs had to be sold to break even.* No doubt, the breakeven point has changed strikingly even since 1972, considering the rising osts of making recordings.

The breakeven volume for popular LP's in 1972, was, on the average, about 61,000 copies. About 77% of the releases of all popular LP's failed to sell enough to break even. About 57% didn't come close; they sold 20,000 or fewer. Here, too, the breakeven point has risen sharply since 1963, when only 7,800 copies of the LP albums had to be sold to break even:

Ninety-five percent of all classical LP's failed to break even, and about 79% of popular tapes did not have sufficient sales to break even. They lost money. The figures for classical tapes are even worse. Rarely, if ever, has a classical tape enjoyed sufficient sales to break even. The classical releases of most firms are "carried" along by the funds generated by the few pop records that are profitable.

This dramatic increase in the breakeven point for all classes of recordings since 1963 is a reflection of the severe cost increases experienced by the recording industry and the greater fixed costs incurred before a record is released. As a result, the recording business has become even more risky. Whereas 74% of all 45 RPM single record releases failed to

The 1963 figures are from the 1965 Glover Report. For full reference see Exhibit 13.

[&]quot;Ibid.

break even in 1963, 81% failed in 1972. Similarly, the breakeven for popular LP's has deteriorated to the point where 77% do not break even, in contrast to 61% in 1963. And, of course, the losses sustained now on these recordings that don't break even are much, much greater.

Another indication that the record business has become more costly and more risky is the growing problem record makers have with recordings returned by wholesalers and retailers. Exhibit 14 shows that since 1969 record returns have risen from 16% to 21% of record manufacturers' gross sales. The dollar cost each year of returns has been enormous: from \$164 million in 1969, this cost has gone up to \$311 million in 1974. These statistics indicate the increasing extent to which record makers must invest -- must expose themselves to risks -- in the manufacture and distribution of new recordings without the assurance even of a final sale, let alone a profitable sale.

In sum, the recording business is exceed_ngly risky. The record-by-record odds against success are especially difficult for the smaller or newer company which can produce only a few releases a year. An increase in copyright royalties, if not passed on, would raise the breakeven point and the odds against success for all record people still higher. It is, therefore, grossly misleading to assert, as the publishing companies have done, that the proposed new mechanical rate would "only" raise the failure rate by 2 or 3 percentage points. It is true, for example, that under a 3¢ mechanical rate, with the increase in rate not passed on, the percentage of 45 RPM single records which did not break even -- that is the failure rate -- would increase from 81% to 83%, a "mere" two points. But the other side of the coin is what really counts: The success rate, alreading, would drop from 19% to 17%. For the marginally profitable, such _drop in an already low probability of success would be forbidding, if not fatal.

A higher statutory license rate could discourage even further the production of classical recordings, which are currently-financed -- subsidized is not a bad work to use here -- to a very large extent by profits from popular records. Because higher royalties, if not passed on, would reduce those

Exhibit 14

RECORD RETURNS: 1969-1974

	. <u>B</u>	ECORD RETURNS	¢ Williams For
	& Gross Sales	* Net Sales	\$ Millions For Total Industry
1974	21.2%	28.3%	\$311
1973	23.5%	32.6%	\$329
1972	19.7%	26.2%	\$252
1971	19.8%	26.3%	* \$229`
1970	18.8%	25.5%	\$212
1969	15.9%	20.7%	\$164

Source: The CRI financial survey of 13 record companies.

[•] Returns have grown from 16% to 21% of Gross Sales.

[•] Teturns have grown from 21% to 28% of Net Sales.

[•] The dollar cost of returns is enormous: \$311 million in 1974.

profits drastically, as we have seen, even fewer revenues than now would be available to invest in classical, "modern jazz", ethnic, show, esoteric, and experimental offerings. The recording industry would thus be under pressure to reduce the cultural diversity it currently offers the American public.

3. Possible Elimination of Smaller, Marginal Record Makers

The increase in statutory license royalties would have a greater impact on small record makers than on the large ones, for the small firms tend to have smaller profit margins and thus less flexibility in coping with cost increases. With lower profits, the small record makers could absorb even less of a statutory rate increase than the more profitable firms.

Thus, a substantial increase in the mechanical royalties rate might reduce the number of firms in the industry. This is scarcely a desired or desirable effect.

4. "Concentration" in the Recording Industry

Allegations which have been made as to excess concentration in the recording industry are not well founded. It is true that there are large firms in this industry, as there are in any industry where there are economies of scale. In 1970, the top four firms in the industry accounted for 62% of the total value of shipments in the industry. A substantial portion of this volume is represented by the product of small, independent record companies, which merely distribute through these larger organizations. But the Federal Trade Commission defines an industry as "highly concentrated" if 75% or more of shipments are accounted for by the top, four firms. Thus, by that definition, the recording industry falls short of being "highly concentrated".

The Commission also gets concerned when the overall trend in "concentration" is <u>rising</u>. However, as Exhibit 15 shows, there has been a decline in the percentage of record shipments attributed to the top four, to the top eight, to the top twenty firms over the last 23 years for which Commerce Department data are available. These shares are volatile from year to year, as musical tastes change and as new entrants pour into the industry. But a trend was clear: In 1947, the top four firms had 79% of the industry's shipments; by 1970; the share of the top four had fallen to 62%.

Exhibit 15-

CONCENTRATION IN THE PHONOGRAPH RECORD INDUSTRY. 1947-1970

Percent of Value of Domestic Shipments Accounted for by:

Year,	Domestic Shipments .(\$millions)	4 Largest Firms	8 Largest Firms	20 Largest Firms
1970	\$437.5	624	73%	(NA)
1967-	\$276.4	58%	67%	81%
1966	\$218.4	714	791	(ŅĀ)
1963	\$180.2	694	75%	85%
1958	\$138.6	76%	83%	\$09
1954	\$ 84.7	70%	80/3	88\$
1947	\$110.2	79 \$.	87%	945
	*			

(NA) = Not available

Source: Annual Survey of Manufacturers: Concentration Ratios, U.S. Department of Commerce.

- e The Top Four firms had yes of the industry's shipments in 1947, but in 1970 only 62%.
- The Top Eight firms had 87% of the industry's shipments in 1947, but in 1970 only 73%.

This is an industry characterized by ease of entry. This is reflected in the rise of the independent record producer in recent years. All he or she needs is an idea and a little money -- not much. He can rent a recording studio. He can rent a sound team. A record manufacturer -- perhaps another company -- will press his records for him. A record company -- perhaps a third outfit -- will undertake to distribute his or her records. This is actually what is happening. Independent producers are proliferating; some of these are performing artists who can achieve both financial and artistic results to their liking by producing their own masters.

The number of independent record producers listed in <u>Billboard</u> rose from 380 in September 1969 to 1,482 in September 1974, an increase of nearly 300% in just 5 years.* Conversely. 12 leading recording companies, in a telephone survey conducted by RIAA in 1975, reported that they had 94 <u>inhouse</u> producers in 1965, but only 54 inhouse producers in 1975 -- a 60% decline in 10 years.

It is important to realize that a higher statutory license rate may endanger this socially desirable trend toward proliferation of the entities in this industry. For the smaller firms, gaining distribution today is like competing in the grocery or discount store business -- before you even get a chance to compete for the buyer's dollar, your product competes for "shelf space" with everyone else's. For those outlets in which you do gain distribution, it is important that your product sell as well as anybody else's, or you will lose that space and distribution. For the smaller firms, which are already struggling for marketing peal, a price increase due to a higher statutory license rate, or other defensive measures of the sorts we have been describing, might make it more difficult for them to sell their products.

Few small firms could afford to absorb any increase in their mechanical license payments. Surely, reducing the threshold of survival for smaller record makers can not be one of the intended results of the bill before this Subcommittee.

These figures are based on the listing of independent producers in Billboard's International Buyer's Guide for 1968-69 and for 1974-75.

II. THE IMPACT OF AN INCREASE IN THE STATUTORY MECHANICAL ROYALTY (CONT'D)

E. THE HIGHER STATUTORY RATE WOULD SECOME THE STANDARD RATE,

NOT A "CEILING"

More than 99% of all royalty rates are at the statutory rate or standard variations thereof. For single records, the 2¢ statutory rate is essentially the rate. For Regular Price LP Albums, the 2¢ statutory rate is payable for more than 80% of the licensed tunes, and rates above and below 2¢ represent standard variations from the 2¢ rate. For budget and club records, royalty rates below 2¢ are the norm and all but a few rates are at standard variations from the statutory rate or are at the 2¢ rate itself. In short; just as was the case 10 years ago, the statutory rate of 2¢ and standard, generally available, non-discriminatory variations therefrom account for the overwhelming bulk of all royalty rates payable on licensed tunes. These findings are based on an analysis of all records released by two record companies during the bulk of 1974 which covered 1,361 licensed tunes on 330 regular price single records and LP albums, and 1,232 licensed tunes on 112 other albums which were heavily discounted to the trade.

We have shown thus far that a higher statutory machanical royalty rate is unwarranted. No less important, surely, it would have adverse impacts on the public interest, performing artists, new and experimental music, and upon the recording industry. These are the reasons:

- The share of the total revenues from record sales that goes to copyright owners is more than generous. It is higher than that provided by Congress when it granted copyrights in musical compositions and, at the same time, instituted compulsory licensing of such compositions.
- The aggregate dollar revenues paid by the recording industry to copyright owners for copyright royalties have been increasing much faster than inflation.
- The dollar revenues generated per license and per tune have increased much faster than inflation.
- The increase in the compulsory rate to 3¢, and more, as proposed in Section 115 of H.R. 2223, if passed on to wholesalers, retailers, and buyers would have a burdensome dollar impact on consumers.
- e If not passed on, the aggregate dollar value of the increase would be so large that it could not be absorbed out of profits. For many companies, especially smaller companies, the increase in royalties payable would be greater than their profits. Record producers would be faced with serious problems.

These fact notwithstanding, there is one final argument put forth by publishing companies, copyright owners, and their representatives that must be addressed and dismissed.

Publishing companies and other copyright owners and their representatives have tried to waive any serious, documented discussion of the impacts of increasing the statutory royalty rate. They have argued that there is , no way of knowing what the effects on payments and on the recording industry would be -- if any. They suggest that even the present 2¢ rate is merely a "ceiling" and that, because of bargaining between record people and publishing companies, the actual royalty rate paid is often less than 24. They have said that raising the rate above 2¢ would merely be permissive, and that it would merely give "more room for bargaining" between publishing companies and record makers. They have said that "the 3¢ would merely be a ceiling" - a higher "ceiling" -- above which this bargaining could not go. They have said that the outcomes of all these "negotiations" would be subject to bargaining on the basis of the "relative positions" of copyright owners and recording companies, case by case. They have implied and have argued that the large majority of licenses granted would be bargained down to rates less than the statutory rate.

The picture suggested by this argument, of numbers of publishers and recording companies -- there are hundreds of each -- all sitting down together, haggling and negotiating rates and bargaining on the strengths of their relative positions, case by case, for each of more than \$0,000 licenses granted in a representative year is a beguiling one. And it is a grave misportrayal of-how the industry has worked, now works, and must work.

The statutory, compulsory license rate is, and has been, the standard rate, which, along with standard, recognized non-discriminatory variations therefrom, accounts for practically all license rates paid. The present statutory rate is not a "ceiling". It is the standard rate. In fact, some rates are paid that are above that standard; but these, also, are at standard, established variations above the statutory rate:

Such standard variations provide for lower rates for such uses as socalled "budget records" and records distributed by record clubs, and for higher standard rates on musical renditions that run for more than 5 minutes. Most of these variations are issued by means of standard licenses, issued routinely and practically automatically by a licensing agency used in common by most publishers. This is a point to which we shall return in a moment.

It was almost exactly 10 years ago that I presented here incontrovertible evidence that the vast majority of the rates paid to publishing companies were at 2¢ and that, with rare exceptions, the rest were at standard variations from the statutory rate. These rates were not the results of "bargaining" or "negotiation" case by case. They were the outcomes of prevailing and necessary industry practice.

To make the point again, and to lay this ghost of "bargaining" to rest once and for all, I shall in a moment give you added, very recent evidence that shows that the practice of 10 years ago is -- inevitably -- still the practice today. This is no mere happenstance. But before doing so, let me explain briefly why it is that the industry does and must operate on the basis of standard license rates and standard variations, and cannot operate on the basis of case-by-case bargaining. When this is understood, it will be seen why the present statutory rate is the standard rate and why any new statutory rate would, in turn, become the new standard.

First, as I pointed out a moment ago, some 50,000 licenses may be granted in a representative year. It is simply not feasible for publishing companies and recording companies to bargain together for each of these many, many accesses. A major recording firm may obtain, and a major publishing company may grant, a score or more licenses on a working day. As a practical matter, there must be, and there is, some administrative mechanism for handling this problem. And that mechanism is based on standard contracts that incorporate standard conditions under which licenses are granted and standard rates which, together with standard variations, account for practically all rates, with only a few exceptions. These standard, prevailing rates are not "bargained". Only very seldom, as I showed ten years ago and as I shall snow again, are unusual arrangements "bargained" out and entered into.

Any other procedure would simply be impractical.

In passing, let me point out very briefly a source of semantic confusion as to the process of what is sometimes called "negotiation" of license rates for use of copyright music in mechanical reproduction. In theory, there are two avenues to obtaining a license: either through the route of "negstiation" or through the "compulsory" route. "According to the theory of the copyright law, a person wanting to use a tune in mechanical reproduction of music can try to "negotiate" a license from the copyright owner. Then, if a copyright owner is uncooperative or intractable, any party wanting to record a tune that has once been recorded may simply go ahead and do so and pay royalties at the compulsory statutory rate of 2¢ under conditions and procedures prescribed by the Register of Copyrights. In fact, the administrative and procedural mechanics of the compulsory route are cumbersome for all parties, and are only very rarely used. Instead, publishing companies have set up routine procedures for going the route of "negotiation". By definition and usage in the trade, any license that is issued under any procedure other than the "compulsory" provision is said to be "negotiated", even if -- and this, is crucial to understanding how the industry works - the license is actually issued under the most routine, the most automatic procedure. Tens of thousands of licenses are issued every year absolutely routinely, absolutely automatically. 8 And because they are not issued under the "compulsory" procedure they are -- by definition -- "negotiated". The fact that they are thus · labeled in the trade should not mislead one to suppose for a moment that they were in an real sense haggled over or "bargained for".

This leads us to the second point in understanding why any new proposed statutory rate would, in turn, become the standard rate.

⁸In fact, many -- probably most -- licenses are applied for and granted in this routine fashion <u>after</u> the fact of recording, not before, as one would expect if there were <u>any real</u> negotiation.

A majority of copyright licenses are, and have been for many years granted through a single, common agency of the music publishing companies -the so-called "Harry Fox Office". This agency has been owned since 1969 by the National Music Publishers' Association. This agency is the commonly and generally used instrumentality where licenses are routinely and, for practical purposes, well-nigh automatically issued on behalf of copyright owners - that is to say, "negotiated". When a record producer wants to use a tune, he fills out a standard license form indicating his intentions and sends it to the Harry Fox Office. He does not wait to receive some form granting permission; that is unnecessary. He obtains permission through filling out and filing the contract form, and proceeds to make his recording automatically. Later, the Harry Fox Office will issue to the recording firm a standard contract, specifying the standard conditions, standard rates, or standard variations therefrom, under which the license is granted. The recording firm later sends the royalties due upon the license to the Harry Fox Office which remits payments to the copyright owner or owners of the tune licensed.

There appear to be a few publishing companies that now do not use the Harry Fox Office to issue licenses and collect royalties and monitor payments. More important, publishing companies and recording companies sometimes go around the Office when they are under common ownership. So also, sometimes, do artist-composers own the whole or a share of copyrights to music they are performing on a record; the record company generally pays royalties to them directly in such cases.

Nevertheless, the fact, alone, of the existence and use of common licenseissuing and royalty-collection and monitoring agencies, as I pointed out 10 years ago, could be a sufficiently important factor in industry practice to establish, at very least, a strong "pathern" in contract forms used and license royalties charged.

There is a third reason why there is not, and will not be, as argued by publishing interests, bargaining according to the relative strengths of the

Often, tunes are subject to fractional ownership interests. In such instance, a separate payment is remitted to each owner for his share of the royalty payment due on the particular license.

parties. As I pointed out 10 years ago, some might question the legality of a situation in which a publishing company accepted royalty rates not regularly made available by it to all record companies on a non-discriminatory basis, or in which a recording company pays rates not regularly paid by it on a non-discriminatory basis to all publishing companies. It might be argued that payment and receipt of different royalty rates arrived at, case by case, on the basis of "relative bargaining positions of the parties" would undermine the intent of Congress to make copyright music available to all and to prevent more powerful companies -- whether publishing companies or recording companies -- from achieving monopoly positions.

Let us turn now to a re-examination of the merits of the argument of publishing companies that raising the statutory rate would "merely" raise the ceiling below which, or up to which, publishing companies and recording companies would "bargain according to their relative strengths". We have just examined in great detail a large sample of records issued recently by two recording companies. In mid-December, 1974, we asked two large record companies, one being among the four largest firms in the industry and the other among the next four, to cooperate with us in the preparation of an extensive copyright royalty analysis. We asked them to provide us with mechanical rates agreed to be paid on licenses for all tunes included on all records which they had released in 1974 up to that time. One of these companies, which updated its files only on a quarterly basis, supplied us with information on all of its releases for the first three quarters, or 9 months, of 1974; the other provided us with information for all 1974 releases through the end of November., These data, covering the royalties paid for all of the copyrights on all of the records released by the two record companies in those periods, formed the basis for our analysis. To give some idea of the size of the two companies who provided the data, it is estimated that in 1974 they had record sales (not including tapes) on the order of 50 million records.

The data are in two parts. The first part covers records distributed through the trade and the second consists of records distributed only through record clubs, or as premiums through non-music channels. Each part will be analyzed separately. First it is necessary to distinguish among three broad classes of these records released through the trade:

- a) "Singles", that is, 45 RPM records, usually with 2 tunes, one on each side;
- b) Megular Price LP albums of popular or classical music, usually with multiple tunes or "bands" on both sides of a long playing record or records; and
- c) Other LP albums issued for budget priced distribution -- as, for example, reissues of older records under "budget" labels.

In Exhibit 16, the data relate to the numbers of separate tunes included on each of the three types of records, classified by the level of the mechanical royalty rate to be paid for each copyright. The exhibit covers data on 1,723 separate tunes: 324 on "Singles"; 1,219 on "Regular Price" LP albums; and 180 licenses on tunes on "Budget" albums.*

Also, one should note that no royalty was paid on many tunes. In practically all of these cases, the tunes are in the public domain, and of course, no royalty is required of the record company: These tunes are, primarily, classical music. In a few cases, the company providing the data acted only as the distributor of the record released. The license fee or fees, if any, in these instances would have been paid by the independent record producer or other party for whom the record company was acting as distributor. The numbers of tunes on which no royalty was paid are shown in the lower section of the table.

The distribution patterns of royalty levels vary markedly among the three types of records:

1. For singles, the statutory rate of 2¢ was paid in 95.9% of the cases. Only 4.1% of the rates were below 2¢. None were paid at more than 2¢. As a generality, rates that are paid at more than 2¢ are paid in connection with

Because of the marked differences among the three patterns of rates paid on Singles, Regular Price albums and Budget albums, the overall pattern of rates paid on all licenses will be affected greatly by the relative numbers of licenses paid on the three types of records. Although we have no question as to the representativeness of the rate levels paid for each class of record, we do not know whether or not the proportions of the three types of records in our sample are representative of the whole universe of records released by the recording industry. For example, some companies do not issue "Budget" records. For this reason, we have not shown an overall percentage distribution paid for all licenses in the "Total" column for all types of records.

Exhibit 16

DISTRIBUTION OF ROYALTY RATES PAID ON COPYRIGHTS,
BY TYPE OF RECORD, ON REGULAR PRICE AND BUDGET-LABEL RECORDS
RELEASED TO THE TRADE BY 2 COMPANIES IN 1974 PERIODS

	Number of Licenses				
Level of Royalty	Singles	Regular Price LP Albums	Budget Label LP Albums	Total a	
2¢ (Statutory rate)	. 302 . 95. 9%	848 81.15	61 33.9 %	. 1,211	
Over 2¢ (Playing time provision)	0 0.0%	74 7.1%	0.0%	74	
Subtotal, 2¢ or more	302 95.9%	922	61	1,285	
Under 2¢ (Discounted royalty rate)	13 4.1%	124 11.8%	119 66.1%	256	
Licenses, (with royalties) Subtotal	315 100.0%	1,046	180 100.0%	1,541	
No royalty	9	173	0	182	
Total	324	1,219	180	1,723	

Does not include 15 tunes individually licensed in the 1974 period, but where the entire record was not released in the period. These 15 tunes include 5 on Singles at 2¢, 4 on regular price LP's at 2¢, 1 on a regular price LP at more than 2¢, and 5 on regular price LP's with a fee. None of these tunes were licensed at a discount.

Note: Exhibits 17, 18-A, and 19 show the tune by tune royalties paid for each of the 1,541 paying licenses shown above, and will be found on pages 67-80.

the renditions of tunes that run longer than 5 minutes. It is difficult, if not impossible, to get more than 5 minutes of music on a 45 RPM single. For that reason, no mechanical royalties above 2¢ are to be expected on such records. The pattern of royalties for singles, therefore, is clearly one where the statutory rate is the established norm and where discounted fees are truly exceptional. We shall return to the topic of discounted rates in just a moment.

- 2. For Regular Price LP albums, the statutory rate is also the standard practice. More than 80% of the licenses were at 2¢. In this type of record, we do see some longer than average renditions. On these LP's, about 7% of the rates paid were above 2¢. The frequency of rates below 2¢ is greater than for singles, and amounts to nearly 12% of all licenses. These rates will be analyzed in depth in just a moment.
- 3. For <u>Budget LP</u> albums, the pattern is quite different. On these records, discount rates are a prevailing practice. On these albums, nearly two-thirds of all the licenses were at less than 2¢. About one-third of the licenses were at the 2¢ statutory rate.

Having established the existence of these three patterns, we then set out to ascertain the reasons for appearances of rates other than the 2¢ statutory rate in each record category. Specifically, three types of discounted rates appear in connection with Regular Price records:

- 1. "Artist Interest" This sort of discounted rate occurs on both singles and albums when the performing artist has an interest in the copyright of the tunes.
- 2. "Block Discount" This discount occurs when several tunes on an album record are owned by a single holder.
- 3. "Medley Discount" This discounted rate occurs when several tunes are interwoven in a rendition, where a fragment of a tune is used in transition between two tunes, or in other instances, where a tune is used for only a short duration. The extent of a medley discount in a particular instance seems to be governed in part by the length of time the medley, theme, or excerpt is used.

Because of the differences in rate patterns among the three types of records, which was noted above, we prepared a separate tabulation for each type of record. Exhibit 17 covers the Singles; 18-A & B, the Regular Price LP albums; and Exhibit 19 covers the Budget label albums.

Royalty Rates on Singles

As regards "Singles", a cursory glance at Exhibit 17 is all that is needed to show that the statutory rate is the standard rate for such records, and that discounted rates are very rare. Of the 162 records covered, there were discounted rates on only 7 records, and as indicated above, the discounted rates applied to only 13 licenses, only 4.3% of the total of 315 licensed tunes. In each of these 13 instances, the performing artist either owned or had an ownership interest in the copyright of the tune being performed, and granted a flat mechanical rate for the entire record. Of these rates discounted because of artist interest, 11 or 85% were at 1.50¢, and 2 or 15% were at 1.75¢. The one record with two rates at 1.75¢ suggests the possibility that real negotiation as to royalty may occasionally take place with singles. However, it is more likely that the rate arrived at reflects other provisions in the contractual arrangement between artist and recording company in addition to the "relative" bargaining strengths" of the parties. Most of the "bargaining" in these instances seems to relate more to payments for the artist's performance, or to the price of the master tape which may be produced by the artist himself, rather than to the royalty rate paid on the copyright, as such.

In summary, 2¢ is the prevailing rate for singles. Departures from that rate represent standard, common recognized variations from that 2¢ standard.

Royalty Rates on List Priced LP's

We now turn to royalty rates paid on licenses for tunes on List Priced LP albums.

- As shown in Exhibit 16, the sample included 168 such albums carrying a total of 1,219 tunes. Of these, 173 tunes carried no royalty rate, leaving 1,046 licensed tunes on which a royalty
- rate was payable. Of these licensed tunes, the statutory royalty rate of 2¢ was paid in 848 instances or in 81.1% of the cases.

- On 74 tunes or 7.1% of the instances, rates of more than 2¢ were paid for tunes of longer than average duration in accordance with standard practice.
- That leaves 124 licensed tunes, or 11.8% of the cases on which <u>less</u> than a 2¢ royalty rate was paid. These occurred on only 17 of the 168 albums covered by the sample.

A detailed look at these 124 exceptions reveals a great deal about how the music publishing industry and the recording industry interface with each other.

Exhibit 18-A on p. 74 details all rates for all Regular Price LP's in the sample. The pattern of discounted rates by level of rate and by reason for the discount appears on the next page in Exhibit 18-B. Of the 124 rates payable at less than 2¢, 56 were for tunes in which the performing artist had an ownership interest. Of these rates, 50 were paid at 1.50¢. These rates are scarcely results of "bargaining". This rate of 1.50¢ represents 3/4 of the statutory rate and is customary in the industry. There remain 6 other rates of less than 2¢ in which the artist had an interest. On one album, a group of performing artists was also the composer and publisher of a block of 5 tunes and this group granted only a 1/4¢ discount on the license covering these 5 tunes. On another album, arrangements were made with a single artist-composer covering the entire record of 10 tunes for an overall royalty rate of 22¢ for the album. Two of the tunes were of longer than average duration and had rates above 2¢, 7 were at the statutory rate of 2¢, and the 1 which was shorter than average duration was allocated the residual amount of the album rate, namely 1/2¢.

There were 40 rates of less than 2¢ which represented "block discounts" which are customarily paid when a record contains several tunes in which the copyright is held by a single owner or group of owners. It is a form of quantity discount, generally recognized in the industry. Records containing such

. Exhibit 18-B

ANALYSIS OF ROYALTIES PAID AT LESS THAN 2¢

ON LICENSED TUNES ON REGULAR PRICE LP ALBUMS

	Totals	1:75¢	1.50¢	1.25¢	1.00¢	<u>.75</u>	<u>.50</u> ∉
						•	
Artist Interest Discount	56	. 5	. 50	-	-	-	1
Brock Discount	40	10	12	-	.8	10	
Medley Discount	_28	2	. <u> </u>		12	6	· <u>3</u>
TUTALS	124		<u>67</u>	0	20	16	<u> </u>

"blocks" of tunes are often recordings of works of a single well-known composer. These 40 block discount royalty rates were all for tunes on 4 regular LP albums:

- In one album a publishing company granted a 1/4¢ discount on a block of 10 tunes which it owned and which made up the entire record. (#312.)
- Another publishing company granted a 1/2¢ discount per tune for a 12-tune record on which it owned the entire block of 12 tunes. (#349.)
- Another record involved a contract with a film producer and several publishing companies for the film score involving a record of 14 tunes. One of these publishing companies granted a rate of 6¢ for a block of 5 tunes -- 1 tune at 2¢ and 4 at 1¢. Another granted a rate of 8¢ for a block of 5 tunes -- 3 at 2¢ and 2 at 1¢. The rates for the other 4 tunes of other owners were at the statutory level. (#301.)
- Finally, one publishing company arranged a set of rates for a 16-tune album, all tunes owned by it, on a volume basis. The album rate for the first 50,000 records sold was 23¢, for the next 50,000 was 25¢, and for all sales above 100,000 was about 33¢ per album. Four of the tunes were no longer than average and had royalty rates greater than 2¢. All other tunes were of shorter than average duration and the block rates arranged were 2 at 1¢, and 10 at 3/4¢ for the first:50,000 records sold. (#369.)

There were also 28 licensed tunes on 5 albums with royalty rates of less than 2¢ on the basis of their being designated as "medley discounts". Such medley discount rates occurred as follows:

 On one album (#367) of 20 tunes there was a 6-selection medley and a 2-selection medley. The first medley ran for 3-1/2 minutes with 5 tunes, each from a different publishing company at a 1/2¢ discount and the sixth involving a split between two publishing companies at a 1/4¢ discount (one publishing company granted 1/2¢ but the other refused to grant any discount). The second medley ran for two minutes and 50 seconds with one publisher granting a 1¢ discount and the other insisting on the statutory rate.

- A second album (#373) of 16 tunes had discounted rates of 1/2¢ for three transitional tunes of 5 seconds, 9 seconds, and 19 seconds duration.
- A third album (#418) of 11 tunes with one longer than average had a discount of 1¢ on a transitional tune of very short duration.
- The fourth album (#431) of 15 tunes had a 5-tune medley with all tunes owned by the same publisher on which a medley rate of 3/4¢ per tune was granted.
- The fifth album (#354) of 21 tunes contained 2 medleys each of 7 tunes. All 7 tunes of the first medley which ran 4 minutes and 50 seconds were owned by the same publishing company which granted a discount of 1¢ on each tune. No two of the tunes of the second 7-tune medley, which ran just over 5 minutes, were owned by a single publisher. No discounts were granted on 3 of these tunes, a 1¢ discount was granted on another 3 of these tunes, and a 1-1/4¢ discount was granted on the seventh tune.

In these rates, certain practices are revealed that are more or less standard in the industry. They cover situations which we have designated as artist-interest discounts, block discounts, and medley discounts. Though the amounts of discounts granted in these instances are not uniform, the examples of real bargaining between the parties concerned are rare, because the practices of any one publisher are usually standardized.

In sum, we we looked at Regular albums released over the better part of a year by two well-known record makers and have found that the royalty rates paid were the statutory rate or standard, uniformly available, variations therefrom.

Royalty Rates on Other Than Regular Price Records

We now turn to an examination of the royalty rates paid on "Club" and "Budget" albums sold by these two recording organizations in order to see whether, in that part of their business, there is "bargaining" between them and publishing companies, case by case, on the strength of their relative positions. A "Club" record is one which is received periodically at a reduced price -- much as best-sellers are distributed at reduced prices through book clubs. "Budget" records include re-releases of once popular tunes, re-makes of classical recordings, and the like, analagous to a paperback version of a cloth-bound book.

Rates on "Budget" Records

. It was noted above that the pattern of royalty rates for the 14 "Budget" albums as shown in Exhibit 19 is markedly different from the patterns for "Singles" and List Priced LP albums. For budget albums -those which will retail at less than \$4 per disc -- most publishers offer a discounted royalty rate for the use of their tunes. This would be the expected pattern both because of the pressure on producers to keep each element of costs as low as possible and because publishers and other copyright owners see opportunities to obtain incremental revenues which may not be otherwise available. Because budget records often constitute reissues under budget labels of tunes produced at an earlier date on regularly priced records, both producer and publisher may perceive an opportunity for additional revenue for a reissue of an older and popular, record at a budget price. Publishing companies regularly grant discounted royalty rates per record for the chance to obtain these incremental revenues. Some publishers grant such discounts on a blanket basis in a letter which covers a publisher's entire catalog of tunes; other publishers do so on a record-by-record basis.

It is clear from the pattern of Exhibit 19, that with budget records, discounted rates are the norm rather than the exception. Actually it is surprising that there are so many tunes licensed at the statutory rate. On only 2 of the 14 albums covered are there no discounted rates. For all 14 albums, about a third of the licensed rates are at the statutory level, about two-thirds of the rates are at discounted levels.

There is some variety among the discount levels as well. Nearly half of the discounted rates are at one-half the statutory rate of 2¢, and additional significant percentages are at a 1/2¢ and 3/4¢ discount. This variety is somewhat greater than that of a decade ago. It appears that individual publishers are setting their own discount policies and no single pattern has yet appeared. But it should be noted that even for such records most publishers continue to have standard discounts for their own tunes which are used in budget albums.

4-A214-72-0 17

ROYALTY DISTRIBUTION OF TUNES ON RECORDS RELEASED TO THE TRADE IN 1974-PERIOD

Regular Price Singles* .

				Burer 11.	ce srikte					
	Record .	Over 2¢	2≰	1.75¢	1,50¢	0¢				
	101		2							
	101	 						т		
	102		2							
	.103		2	<u> </u>						
			•							
;	104	 	2		ļ		<u> </u>		ļ	
	· 105		2							
	106	•				2				
				 					 	
	107		2					`		
	108	 	1		ļ	1		ļ		
		 			 				 -	
	109		2							
	110		2		 -				 	
-•		 			 			 	 	
	111		2							
	112	 	2		 			 	 	
				 	 			 -	 	
	113		2				· ·			
	114	 	2	 -	ļ	 _				
	114			 			<u>-</u>	 	 	
	115		2							
	116	 	1	 	 	1		 	 	
	i	 		 	 	 -		 	 -	
	117		2							
	118	 		 	 	2	 	 	 	
. —	}	 		 	 		 	 	 	
	119		2							
	120		2	 -	 	 -		ļ	 	
	1	 		 	 	 	 		 	
	121									
	122	 	2	 	 		ļ			
				 	<u> </u>					
	123		2						ļ	
	124	 	2	 	 	 	 		 	+
									<u> </u>	
	125		2							
	126			 	 			 	-1	} -
	V		4							

rvurnic to (courtumen)

ROYALTY DISTRIBUTION OF TUNES ON RECGRDS RELEASED TO THE TRADE IN 1974 PERIOD

 		•	Pegular	Price Si	ngles*	·			
Record	Oyer 24	2¢	•	1-50e	0¢				
 127		1			1				
 128		. 2			•				
 129		2				<i>`</i>		•	
 131									
132		1			1				
 133		2							
 134		ŀ			1				
 135 136		2 2		•			·		
 137		2 .							
 138		2							
 139									
140		2							
 141		1		11					
143_		2							
 144		2		-					
145		2							
 146	-	2		<u> </u>					
148		2							
 749		2				<u> </u>			
 150 •		2							
151		2							
 152									

ROYALTY DISTRIBUTION OF TUNES ON RECORDS RELFASED TO THE TRADE IN 1974 PERIOD

Regular Price Singles*

 			Regular	Price Sin	gles*				
 Record	Over 2¢	2¢	1.75∤	1,50¢		•	خنجيت		
	0,01		, 20,738	76206	Q¢			-	
153		_2							
 154		2			 				
							,		
 155		2			<u> </u>				
156		2		·					
 157	ļI	2			ļ				<u> </u>
 158		2				•			
159		2							
160		_							
		2							
- 161		2	•						
 162		2							
1									
 163		2 .		<u> </u>	 	·		 -	
164		2			·				
 165		2	•		 		<u> </u>	ļ	
									•
166		. 2						· _ ·	
167		2							
168	-		21						
			2*		 		<u></u>		
169		2							
 170		2			 				
,					·				
 171 -	 			21	 				
172		_2							
 173		2		<u> </u>	 				
								**	
 174	 	2		 -	 	* ,	 	 	<u> </u>
175		2							
176		2							
17/		_2			<u> </u>			ļ	<u> </u>
178		2							
 		<u> </u>	J	L	ــــــــــــــــــــــــــــــــــــــ	ــــــــــــــــــــــــــــــــــــــ	l	L	L

ROYALTY DISTRIBUTION OF TUNES ON RECORDS RELEASED TO THE TRADE IN 1974 PERIOD ' Regular Price Singles*

				Regular P	rice Sing	iles*			,	
	Record	Over 2¢	2¢	1.75¢	1.50¢	0¢	•			
	179	<u>`</u>	2				3			
										
<u> </u>	180		2							
	. 181									
	-181		2							
	182 ·		2							
	183		2							
	183									
	184		2							
	185		2				ļ			
	186		2							
							<u> </u>			
	187		2			 				
	188		22							
						· · · · · ·				
	189		2					ļ		
	190				21-					
	191		. 2			 	<u> </u>			<u> </u>
	192		. 2			-				
	193	ļ	2			-	<u> </u>			ļ
	194		2							
									·	
	195		2		ļ	ļ		ļ		
	195		ž		-	 				
									^	
	197	 	2		 	 		<u> </u>	 	
	198				21-	<u> </u>	 			
	199				·	 		ļ		
	200		2					 	 	
	201	ļ	? -		 	 	 	 		
	202	 	2	 		 		 	 	
	203		2			·	ļ	ļ	 	
	204	 			 	 		 		
11		1	}	}	ł	1	1	1	i	L

103

PAULONE TA GEORETHICAL

ROYALTY DISTRIBUTION OF TUNES ON RECORDS RELEASED TO THE TRADE IN 1974 PERIOD

Regular Price Singles*

		<u> </u>	,^	gular Pri	ce Single	25~				,
	Record	Over 2¢	2¢	1.75¢	1.50¢	0¢				
	205		2							
		<u> </u>	!							
	206	•	. 2	<i>'</i>	•	· ·				
								\$		
	20.		2							
		·								
	208		2		• •					
										
			2							
	209					ļ				
	210	 	2							<u> </u>
										<u></u>
	211		22							
		<u> </u>				l			*	
II	212		2							
						l				
	213		2							
	214		2							
-, 										
	215		2			 				
		 				<u> </u>				
		ļ						<u> </u>		
	216	ļ	_2							
	<u>`</u>									
·	`217		2				-			<u> </u>
`		<u> </u>			- x					
	218	,	2					-		
				_						
	219		2		-,	· · · · · · · · · · · · · · · · · · ·				
		1								
	220		2							
		 								
	221		2							
		 				 				
										
	222		2		-					
		 				 				
	223		2	<u> </u>		 		<u> </u>		
	224	<u> </u>	2							
!										<u> </u>
	225		2							
	226		2						1	
		,								
	227		2			i	. *	i — — —		
		 		1						
	220 4	 	2	 		 				
	228 :	 		 						
· 		 		 			ř			
	229	 	2					ļ <u>.</u>	<u> </u>	
	<u>.</u>									
	230		2	<u> </u>						
						!			l	<u> </u>

104

EYHTOTE IN (COHETHNES)

ROYALTY DISTRIBUTION OF TUNES ON RECORDS RELEASED TO THE TRADE IN 1974 PERIOD

Regular Price Singles*

	vegriar Little Others									
	Record	Cver 2¢	2¢	1.75€	1.50¢	0¢				•
	<u> </u>			<u> </u>		<u> </u>	<u> </u>			
	231	<u> </u>	2	L	l	<u> </u>				
					-					
	232	1	2			· · ·	 	· · · · · ·		
		 			 		 	 	 	
		· 		ļ	 	 	}	ļ	ļ	ļ
	233	 	2					 		
		·		l	<u> </u>	<u> </u>	<u>l</u>	l		
**	234	1	2				1			
garde,	I								\$1.4	· ·
	235	1	2	 	 -	 	 	 	8:4	
	233		<u></u>		 	 	 			
					ļ	 	ļ		<u> </u>	
	236	11	2	L	<u> </u>		<u> </u>	<u> </u>		1
	l									
	237	1	2				1	1	1	1
		1.			1			 	· ·	
	238	 	2				 			
	430	 			 	 		ļ	<u> </u>	ļ
	ļ	 -					1	<u> </u>	L	
	239	1	`		21		<u> </u>	L	<u> </u>	L
	ll	<u> </u>		L	1	Ľ				
	240		2				1			
		,				1	· ·	 		
	1044	 				 				
	241	 	2			 	 		 	
	<u> </u>	 			 		<u> </u>	<u> </u>	<u> </u>	
`	242	<u> </u>	22				<u> </u>		l	L
,		1				J	J			1
	243		2				·		····	T .
		 				 				
		 				 	 			
	244	 	2		ļ	ļ	ļ	ļ		ļ
		 			<u> </u>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	
	245	<u> </u>	2				<u> </u>	<u>L</u>	L	l
	1	T 1		*			i			
	246		2							
		 							·	
	047	 					 			
	247	 	2							ļ
					<u> </u>	<u> </u>	<u> </u>	<u> </u>		<u> </u>
	248		2			1	L	i	l	L
٦٠	1									
	249		2		i	1	· · · · ·	· ·		
		1		·			 	 		
	955	 			<u>-</u>		 	 	 	
	250	!	2		<u> </u>	 	 	 		
	ļ	ļl							 	<u> </u>
-	251	1			21	<u></u>			L	
	i ,	11				L	L	I		
	252 ~	1					I			
		 	~	··········	 	 				
	055	 			 	 			 	
	253	 	_ 2		ļ	ļ	<u> </u>		ļ	
	II	<u> </u>			 	<u> </u>	<u> </u>	ļ	ļ	<u> </u>
	254 .	1	2		L	L	<u>. </u>	i	L	l
	1.	1					·			
	255	1	2		· · · · · · · · · · · · · · · · · · ·	 				
		 			 	 			 	⊢
		 		ļ	ļ	 	 		ļ	
	256	 	2							
	I	<u> </u>			<u></u>		[
-<		11			L	L			L	i

Exhibit 17 (continued)

ROYALTY DISTRIBUTION OF TUNES ON RECORDS RELEASED TO THE TRADE IN 1974 PERIOD

Record Over 2¢ 2¢ 1.75¢ 1.50¢ 0¢					gular Pri		: 1974 FER :\$*				
257 2			Over 2¢					•			
258 2		257		2							<u>-</u> -
259 2 260 2 261 2 262 2 Total 0 302 2 11 9 Not including four records either released before 1974 or to be released later on which only one of the tunes was licensed in 1974 all at the statutory rate. 1) Artist interest.											
261 2 262 2 Total 0 302 2 11 9 Not including four records either released before 1974 or to be released later on which only one of the tunes was licensed in 1974 - all at the statutory rate. 1) Artist interest.			-								
261 2 262 2 Total 0 302 2 11 9 Not including four records either released before 1974 or to be released later on which only one of the tunes was licensed in 1974 - all at the statutory rate. 1) Artist interest.		259		2							·
Total 0 302 2 11 9 Not including four records either released before 1974 or to be released later on which only one of the tunes was licensed in 1974 - all at the starutory rate. 1) Artist interest.		260		2							
Not including four records either released before 1974 or to be released later on which only one of the tunes was licensed in 1974 all at the statutory rate. 1) Artist interest.		261		2 .					-		
Not including four records either released before 1974 or to be released later on which only one of the tunes was licensed in 1974 all at the statutory rate. 1) Artist interest.		262		2							-
Not including four records either released before 1974 or to be released later on which only one of the tunes was licensed in 1974 all at the statutory rate. 1) Artist interest.											
Not including four records either released before 1974 or to be released later on which only one of the tunes was licensed in 1974 all at the statutory rate. 1) Artist interest.											,
Not including four records either released before 1974 or to be released later on which only one of the tunes was licensed in 1974 all at the statutory rate. 1) Artist interest.		Total	0 4	302	2	11					,
Not including four records either released before 1974 or to be released later on which only one of the tunes was licensed in 1974 - all at the statutory rate. 1) Artist interest.				77							
1) Artist interest.		,		l				 			
1) Artist interest.										<u>. </u>	
1) Artist interest.		Not incl	uding fou	r records	either r	eleased l	efore 19	74 or to	e releas	ed_later	
		on which	only one	of the t	unes was	licensed	in 1974	- all at	the stat	utory_rat	e
		1) Arti	st intere	st.				-			•
							Ŀ÷			·	
							•		1		
		<u>'</u>					 				
							<u> </u>				
	-										
		ļ					<u> </u>	 	 		
										<u> </u>	
			 	 	 		 	 		 	
					نيز						
					***	L					
		<u> </u>									
				<u> </u>			<u> </u>				

Exhibit 18-A

ROYALTY DISTRIBUTION OF TUNES ON RECORDS RELEASED TO THE TRADE IN 1974 PERIOD

		s:		Regular I	Price LP	\lbums*				
	Record .	Over 24	غ 2.00 خ	1.75 ¢	1.50 €	1.25 ¢	1.00 ¢	.75 ¢	.50¢	0
	301		. 8				6 ²			
	302	5		-						
	-303		10							
	304		12					•		
	305	- 3	6						,	
	306		8							
	307				10 ¹			-		
	308		10							
	309	2	6							
	310	2	7				· · · · · ·		11	
	311	2	. 7.			<u> </u>				
	312									
	313		12							·
	314		10							
-	315		10							
	316		10							
	317	5								
	318		10							
	319	1	8						<u> </u>	
	320	<u> </u>	10							
	321		7							
	3'.2	2 ~								-
	323		10				1 M			
	324		11							
· 🔣	325		10							
	326		10							

Exhibit 18-A (continued)

ROYALTY DISTRIBUTION OF TUNES ON RECURDS RELEASED TO THE TRADE IN 1974 PERIOD

Pannel	Regular Price LP Albums*											
Record	Over 24	2.00€	1.754	1.50¢	1.25¢	1.004	.75e	.50¢_				
327				101		 						
328				101 -								
329	1_1_			- 9 ¹ -			,					
330	5	5			`							
331	1	. 8										
332	 	10										
333	<u> </u>	9										
334	<u> </u>	10										
335	1	9		<u> </u>								
336		10		,								
337		10										
338	-	10										
339	-	9							-			
340	1	10										
341	 	10										
342		10										
343		10										
344		10				-	. a					
345	1	. 2	<u> </u>	8 ¹		 		 -				
346		10										
347		10				<u> </u>						
348	 	8			-							
349	<u> </u>	3	<u> </u>	122.								
350	<u> </u>	10			<u> </u>							
351	<u> </u>	10										
352		_10										
353		10							F-			

Exhibit 18-A (continued)

ROYALTY DISTRIBUTION OF TUNES ON RECORDS RELEASED TO THE TRADE IN 1974 PERIOD Regular Price LP Albums*

				egular Pr	ice LP Al	Dums ~		•		
	Record	Over 2¢	2.00₹	1.75¢	1.50¢	1.25≰	1.00∉	.75¢	.50¢	0
	354		10				105	13 -		
	355		10				<u> </u>			
- 2	.356		6				,			
	357	2	4							
	358		10							
	359	-	12							
	360		10							
	361		12							
	362	1	9.	•						
	363		10						<u> </u>	
	364		11							
	365		7		31 -					
	366		11	3	53. —		13 -			<u> </u>
	367		12	2	5	,	1 .			<u> </u>
	368	2	6			^_				<u> </u>
	369	4					2 -	102		
	370		24			ļ				
	371	5	12						·	
	372	2	· 2	<u>5¹</u> -						
	373		13						33 -	
	374		12							
	375		11							
	376	1	1 *					<u> </u>		
	377		6							
	378		12							
							<u> </u>		<u> </u>	

ROYALTY DISTRIBUTION OF TUNES ON RECORDS RELEASED TO THE TRADE IN 1974 PERIOD

Regular Price LP Albums*

	REGULAR PRICE LP ALDUMS										
Reco	rd Over 2¢	2.00¢	_1.75¢	1.50#	_1.25∤	1.004	75#	.50¢_			
379	- 1	_11					·				
380		_12		<u> </u>							
381		12		-							
382	<u> </u>	10									
383	}					 			1 -		
384		4			-						
385		1							9		
386	i	6						·	5		
387	1										
									8		
388		4_							5		
. 389	T				 				4		
390		7									
391	2	8							•		
392		9	•								
393		9	<u> </u>					`	1		
394		9 -							3		
395		5							· 11		
396	į.	1									
397		8							1		
398	1	<u>_</u>							4		
399					 				•		
									3		
400	<u> </u>								8		
401	1								5		
402	• • 1	1		ļ		 			4		
403						ļ			66		
404						 			1		
405			<u> </u>		<u> </u>	<u> </u>					

Exhibit 18-A (continued)

ROYALTY DISTRIBUTION OF TUNES ON RECORDS RELEASED TO THE TRADE IN 1974 PERIOD Regular Price LP Albums*

		кед	ular Pric	ce LP Albi	ums T				
Record	Over 2¢	2.00&	1.75≰	1.50¢	1.25	1.00¢	.75∉	50∉	0
406									1**
407									1**
408	 								1 ***
409									1 ***
410									1
411						<u> </u>			2
412		10							
413	1	1							4
414									6
415		10				-		*	
416	2								3
417	2						-		
418	1	9				13			
419									2
420				ļ	 				4
421									8
422									1 **
423	+								1 **
424						•	ļ		1 17
425						·			<u></u>
426							 		5
427		12							
428		10		<u> </u>					
429	1	7		 	,				2
430		8							2
						<u> </u>	1 53		
431		10		<u> </u>			5-		
				1	1	1	I	1_	

ROYALTY DISTRIBUTION OF TUNES ON RECORDS RELEASED TO THE TRADE IN 1974 PERIOD Regular Price LP Albums*

						.,				
	Record	Over 2¢	2.00¢	1.75\$_	1.50¢	1.25¢	1_00¢_	75¢_	.50¢_	_ 0
	432		2							
	433									
	434		5		•					5
	435	4	3 .							2
	436									2
	437	-								1
	438									
	439							*		22
	440									
	441									1
	442									1
	443									1
	444									. 1**
	445									1**
	446									1
	447		1							
	448									ī
-	449				-					1
	450							·		1
	451					<u> </u>				2
	452				-					2
	453									1**
	A5A									1**
	455					<u> </u>				1**
	456	1								
	457									
	458									1:-
l	L	1	L	L	┖	I	<u> </u>	<u> </u>		

Exhibit 18-A (continued)

ROYALTY DISTRIBUTION OF TUNES ON RECORDS RELEASED TO THE TRADE IN 1974 PERIJD Regular Price LP Albums*

				NCEUIAI .	Price LP	vina	•			
:-	Record	Over 2¢	2	1.75∤	1.50€	1.254	1.00€	.75¢	.50¢	0
	459									1
	460									1
	461				<u> </u>	· · ·				
	462					1				
—	463		- -							
	464									1
\equiv	465									1
	466	1								
	467					<u> </u>	ļ			1
	468									
			•						-	
		74	040			0	20			
		74	848	17	67		20	16	4	173
	•	 					 			<u> </u>
	Not incl	uding eig	ht record	s either	released	before 1	974 or to	be relea	sed later	on
	a_discou	nted roya	the tune	s_ras_lic	enșea_in	1974. N	Suck tu	ne was 11	censed at	
	1) Artis	interes	t discour	t						
	2) Block	discount					- Ser			<u>-</u>
	1	v discoun								
	** Records	#453, 45	4,455, at	id #460, 4	61, and	462 and 4	63 are 3	record a	bums,	
	and #44	14, 445, #	458, 459	and #463	and 464	are 2 rec	ord album	ıs. Each	record	
	in such	albums n	as been :	hown sepa	arately a	na counte	a separat	ely.		
							`			
۵	<u> </u>				 	 	ļ	ļ		
	<u> </u>	<u> </u>	<u> </u>	ļ	<u> </u>	 -	 -			
	∥: -					 				
		ļ	 	<u> </u>	ļ		<u> </u>			
	4						·			

Exhibit 19

ROYALTY DISTRIBUTION OF TUNES ON RECORDS RELEASED TO THE TRADE IN 1974 PERIOD Budget Albums

				Budget	Albums	• • • • • • • • • • • • • • • • • • • •	*	_		
	Album #	Over 2¢	2.00¢	1.75¢	1.50€	1,254	1.004	Other		
	501		9							
	502		9							
								(4 € .53		
	503							2 2 .54 3 01.60		
	504	<u> </u>	•		<u> </u>		101			
-	505					82	í			
	506		3		2	1	3	~·		
	507		1		4	11	1			
	508					9				
	509		1				8		·	
	510						122			
	511		6		6		6			
	512		9	1	4	1	2 .			-
	513		8	í	4		5			
	514		15_		5**	1**	8**			
	Total	0	61	3	25	21	56	14		
	10081	V					30			
	*Total ro	alty rate	for the	albus va	set at	16¢ and i	boxlove	two-medle	<i></i>	
	ì	•		ĺ	•	l.	•			
	**A two rec	ord_set_ get_albu	etailing discoun	for \$7,	on_which_ ielly_on_	some publ the short	ishers a er durat	gr ood t o-		
) Artist	interest	discount						·	
	2) Block d	iscount								
							<u> </u>	1		
								 		
										
			· ·							

Rates on "Club" Records

Finally, there is the second category of non-regular price albums which are sold either to record clubs or to non-music organizations for use as premiums, and which provide additional opportunities for incremental revenues to copyright owners. In the 1974 periods the two record companies released 98 of these so-called "Club albums", all at lower than regular prices. These 98 albums contained 1,052 licensed tunes. For these club album tunes, a standard pattern of discounts is very apparent. In 948 or 90.1% of the licensed tunes, the royalty rate is 75% of the regular commercial rate for that tune. In 89 instances, 7.4% of the total, no discount at all occurs from the regular commercial rate for the tune. In only 15 instances did discounts of other than the standard 25% occur.

It should be noted that the regular commercial rate from which the club rate is calculated is not always 2¢. It is 2¢ for more than 80% of he tunes, but in the remaining cases the regular rate is either above or below 2¢. The pattern of the discounts from the regular rate is set forth, record by rocord, in Exhibit 20, on pages 82-83.

Three other characteristics of the rate pattern can be cited.

- First, in all cases where the regular rate was greater
 than 2¢, the club rate was 75% of the commercial rate.
- Second, in 820 of the 841 instances where the commercial rate was 2¢, the discount was exactly 25%. Of the other 21 cases, no discount was granted on 17 tunes, and a 50% discount was granted on the other 4 tunes.
- Third, where the regular commercial rate was less than 2¢, there tended to be less than the standard 25¢ di)count from the commercial rate. For example, of the 52 instances where the commercial rate was 1¢, only 5 tunes were granted the special 25¢ club discount; there was no club discount granted for the other 47 tunes.

.This concludes the presentation of rate data. .

CLUB RECORDS

Royalty Rates As Compared To Regular Commission Rates On Records Released in 1974 Period

-	Album	Total	Rates		Ras	es at Oti	er Than	75%		
	#	Total Tunes Licensed	at 75%	2¢-2¢	2¢-1¢	1.75-1.5	1.5-1.5	le-le	Other	1
		2,007.00								
	601	14	14			-				
	602	13	13						<u> </u>	
	√603	9	- 8					1		
	604	18	11	1	₩K.			6		
	605	10	10	`	•					
	606	· 10	10			<u> </u>			<u> </u>	
	607	10	10					ļ	ļ	<u> </u>
	608	11	_11						ļ	<u> </u>
	609	12	11		1			ļ	ļ	
	610	10	10						ļ	
	611	12	12				ļ	<u> </u>	ļ	
	612	10	10	5.					 	<u> </u>
	613	10 1	10 8				<u></u>	<u> </u>	 -	
	614	8					ļ	 	 	
	615	10	10 10	,		———		 	 -	 -
	616	10					 	 	 	
	617	8	8 10			 	 	 	 	
	618	10	10			 	 	 	 	
			9			ļ			 	{ ·
	620	9.	10					 	 	
	621	10	12			 	 	 	 	
	622					 	 	 	 	
	623	10	10			· · · · · · · · · · · · · · · · · · ·	 -		 	
·	625	10	10			 		 	+	
	626	5	4			 	<u>-</u>		 	
	627	10	9	1			 	 	 	
	628	9	9			 -	 	 	 	
		5	5	- 2		 		 	 	
	629	10	10	— .			 -		 	
	630	11				 	 	· ·	 	
	631	10	11			 -			 	
	633	10	10			{	 	 	 	
	634	10	10-	ļ ———		 	10		 	
	635	10	10			i			 . 	
					 	 		 	 , 	
	636 637	10	- 8 - 10	 		 -	 	 	 	
	638	9	8		1			 	1	
	639	10	5 -	5	 - 	 		 	1	
	640	10	6	4 .			 	 		
	641	10	10	 		—	 	† · · · · · · · · · · · · · · · · · · ·	 	
	642	10	9	1		1		 	 	· _ · _
	643	10	10			1			1	T
	644	10	10	, , , , , , , , , , , , , , , , , , , 		 	, , , , , , , , , , , , , , , , , , , 	•	 	
	645	10	10	 		1	-	T	1	
	646	10	10	 		1		1	1	
	647	10	9	1		 		1	T	1
	648	10	10		i	 	· · · · · ·	Τ'		
	649	8.	8	l		1	T	1	1	
	650	15	14		1	1	1.	1	1	1
	651	10	10			1	 	1		
	652	10	10		 	1				
	653	21	8 _	2	T			_10	1_1	
	654	12	12							
	*	en fontno								

See footnote on the next page.

115

Exhibit 20 (continued) CLUB RECORDS.

116

Royalty Rates As Compared To Regular Commission Rates On Records Released in 1974 Period (continued)

	Album	Total Tunes	. 0-0		Par	es at Otl	hor The	754		
- 1	# #	Tunes	Rates		Rai	tes at ou	ier man	/33	1 1	
!}-		ricensed	_at_753_	24-56	<u>25=1</u> .5	1.75-1.5	1.5-1.	1 ;1;	Other	
		!	!			ļ		- 		
	655	6	6							
	656	9	9		,	<u> </u>				
	657	.7	7							
	658	12	12							
	659_		2 11				· · · · ·			
	660	13	11	1	1		· · · · · ·	1	 	
	661	7	7			·			 	
 -	662	1	i						 	
 	663	12	12							
<u></u> i⊢						ļ	<u> </u>	-	 	
	664	2	2	<u> </u>		ļ	 			
	665	5	S			<u> </u>	ļ		<u> </u>	
!_		10	3			<u> </u>	7	_	<u> </u>	
i _	667	, 6	i 6			<u> </u>	!		<u> </u>	
		2	. 2	1					<u> </u>	
	669_		29			L	1			
	670	6	6			1			\vdash	
	671	10	10					1	 	
		8	0			3		5	 	
ii	673	9	2			1	 	5	1	
	674		11			 			i	
	675	11	11						 	
 						 	<u> </u>		 	
——i!—	676	12	12			<u> </u>	!		 	
!		j o 10	10				<u> </u>		!	
!_	678	10	9	l		<u> </u>			1	
!	679	1 8	8	i		Ĺ	!	<u>· </u>	<u> </u>	•
	680	24	24				1		1	
- 1	681	29	1 14			1	5	9	1	
	682	1	1 .			1				
	683	9	9			1			1	
	684	1 13	13			i			 	
 -	685	11	11			 	 		 	
	686	16	16	<u> </u>		 	 		 	
	687					 -			 	
		16	5		 	 	 	11	!	
	688	6	6	ļ	<u> </u>	 	 	-	 	
	689	<u> 8 </u>	8		ļ	<u> </u>			 	
	690	21	21	ļ		<u> </u>	<u> </u>		<u> </u>	
_	691	12	11	11				1	1	
	692	12	12							
	693	20	18				2			
	694	6.	6			•	· ·			
	695	20	. 20					7	 	
 -	696	20	20			1			 	
	697	19	19		l	1	 	 -		
 -			1	 		 	 		 	
 -	Total	1,052	948	17	4	4	25	A7	7	
-	10Ca1	1,000	340	1/			 43	- -4/	 '	
-		 	 	 		 	 	-	 	
		 	 	ļ		 			·	
		<u> </u>			ļ		I		<u> </u>	
	The fi	rst rate	of each p	air is the	e regular	commissi	on rate	and the s	econd	
	is the	Club Albi	um rate.	1			i		1	
			1	1			T			
			·			1	<u> </u>		1	
		·	1			1			·	

Conclusion

To sum up: We have looked at over 1,300 tunes licensed for regular price records released to the trade by 2 prominent record companies over the better part of 1974 and more than 1,200 other licensed tunes on budget albums, all as set forth in Exhibit 21. From this exhibit we see the following:

- More than 99% of all licensed royalty rates were at the statutory rate or at generally available, standard variations therefrom. Only 15 rates or 0.6% of those licensed have been characterized as other than standard variations from the statutory rate.
- For regular price singles, the 2¢ statutory rate is essentially the rate.
- For regular price LP albums, the 2¢ statutory rate was payable for more than 80% of the licensed tunes, and the rates above and below 2¢ represented generally available standard variants from the statutory rate.
- For other than regular price records, including both budget label product released to the trade and "Club" records, royalty rates below 2¢ are the norm and all but a few rates are at standard variations from the regular commercial

In short, just as we showed 10 years ago, the statutory rate of 2¢ and standard, generally available, non-discriminatory variations therefrom account for the overwhelming bulk of all rates paid (exclusive of public domain material). The statutory rate, flatly contrary to the arguments of the publishing companies, is not "merely a ceiling". The statutory rate and standard variations are overwhelmingly the norm. There is not, and has not been any significant amount of "bargaining" or real negotiation about these rates. Nor would there be in the future under any higher rate. Any statutory rate would become the norm. The outcome and the effects of a higher rate can be forecast with confidence.

Exhibit 21

DISTRIBUTION OF MECHANICAL ROYALTY RATES PAID ON COPYRIGHTS

BY TYPE OF RECORD

ON ALL RECORDS RELEASED BY 2 COMPANIES IN 1974 PERIODS

	Regula	r Price R	ecords .	Budg	A11		
,	LP Albums	Singles	Total	Budget	Club	Total	Records
Total Licensed Rates	1046	315	1361	<u>180</u>	1052	1232	2593
2¢ Rate.	848	302	1150	61	17	78	1228
Above 2¢	74	0	74	0	30	30	; 104
Below 2¢	124 🕻	13	137	119	"100S	1124	1261
Types of Rates Below 2¢(,					`	•
Artist Interest Discount	56	13	69	10	-	. 10	. 79
Block Discount	40	0	40	20	-	20	60
Medley Discount	28	0 ,	28		٠.	•	28
Budget and Club Discount	- ,	-	. ,. 	75	. 998 •	1073 ,	1073
Other Than Standard Variations	0	0	0	14.	. 7	21	. 21

^{*}Rates other than standard be or he intervals or percentage thereof.

Source: Two major record companies having an estimated unit sales volume in 1974 of 50 million records.

TECHNICAL APPENDIX

TO THE

STATEMENT OF JOHN DESMOND GLOVER

ON

H.R. 2223, SECTION 115

BEFORE

SUBCOMMITTEE ON
COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
NINETY-FOURTH CONGRESS, FIRST SESSION

September 11, 1975

PREFACE

This Technical Appendix explains, supports and amplifies the data contained in the "Statement on Sec. 115 of H.R. 2223 of John Desmond Glover, Director, Cambridge Research Institute" before the Subcommittee on Courts, Civil Liberties, and the Administration of Justrice of the Committee on the Judiciary, U.S. House of Representatives, September 11, 1975. The statement was based upon a study of economic effects of proposed changes in provisions of the copyright law relating to the licensing of copyrighted music for recordings. This was the second such study conducted in ten years.

The material that follows is organized into two main sections. The first section supports exhibits in the Summary Statement (pages 1 to 31 herein) presented orally by Dr. Glover to the Subcommittee. References are provided to specific sections of the full statement which explain the conclusions stated in the Summary exhibits. The second section supports exhibits in the full statement, as needed.

CONTENTS OF TECHNICAL APPENDIX (organized by exhibit supported)

	(organization of ourself organization)	0
SUMMARY -	EXHIBITS	Page
٨.	No Economic Justification for an Increase .	123
В.	Price Per Tune is Down; Copyright Owners' Share is Up	123
c.		123
D.	1963-1973	123
E.	and Median Family Income, 1963-1972	123
F.	Payments to Copyright Owners Would Go Up \$47 Million	124
G.	Annual Cost to Consumers Could Go Up By \$100 Million	124
н.	Breakeven Point Higher Than Ever	124
ı.	Rates Paid are Statutory Rate and Standard Variations	124
J.	In 1974 as in 1963 Tunes were Licensed at 2¢ or Standard Variations	124
κ.	No Economic Justification for an Increase	125
FULL STA	STATUTORY LICENSE ROYALTIES AND RECORD COMPANY PRICE: 1909 vs.	126
2 & 3.	INCOME TO COPYRIGHT OWNERS FROM RECORDINGS, 1973 vs. 1963	126
4.	STATUTORY MECHANICAL ROYALTIES PAID PER RELEASE OF RECORDED TUNES: 1963 vs. 1972	132
5.	ESTIMATED FINANCIAL STATISTICS AND INCOME STATEMENT FOR THE U.S. RECORDING INDUSTRY, 1955-1974	132
6.	STATUTORY LICENSE ROYALTIES PER TOP 150 LP ALBUMS IN 1973 AT VARIOUS STATUTORY RATES	158
7.	FINANCIAL IMPACTS OF PROPOSED INCREASED MECHANICAL ROYALTIES ON MUSIC PUBLISHING INDUSTRY AND RECORDING INDUSTRY, 1971-19.	159
8.	MECHANICAL ROYALTIES COMPARED TO RECORDING INDUSTRY PRE-TAX PROFITS FROM RECORDS MADE AND SOLD IN THE UNITED STATES, 1971-1974	160
9.	INPACT OF A COPYRIGHT ROYALTY INCREASE ON CONSUMER PRICE	160
10.	COST TO CONSUMERS OF A 3¢ STATUTORY LICENSE RATE	161

		122
		Page
11.	IMPACT OF A COPYRIGHT FEE INCREASE ON JUKEBOX OWNERS	161
12.	TUNES AND PLAYING TIME OF TOP 150 LP ALBUM RECORDS	161
13.	RECORD MAKERS JNIT SALES PER RELEASE AND BREAKEVEN POINTS (1972)	161
14.	RECORD RETURNS, 1969-1974	163
15.	CONCENTRATION IN THE PHONOGRAPH RECORD INDUSTRY 1947-1970	163
16. to	DISTRIBUTION OF ROYALTY RATES PAID ON COPYRIGHTS BY TYPE OF RECORD ON RECORDS RELEASED BY TWO	163
21.	COMPANIES IN 1974 PERIODS	

SUMMARY EXHIBITS

For data supporting material in the "Summary Statement", see the appropriate sections in the full statement (pp. 33-118) and in this Technical Appendix.

Exhibit A -- No Economic Justification for an Increase

This exhibit summarizes the conclusions of the full statement. The basis for the finding that copyright owners' income has outpaced inflation is provided in Section I.B. of the full statement, pp. 37 to 43. The impacts of an increased statutory rate are spelled out in Section II.A. to II.D. of the full statement, pp. 56 to 81.

Exhibit B -- Price Per Tune is Down; Copyright Owners' Share is Up

This conclusion is based on Exhibit 1, p. 36. It should be noted that the price per tune received by second companies has declined in current dollars since 1909, even though today's product is far superior in quality.

Exhibit C -- Mechanical Royalties Have More Than Douoled

The data in this exhibit are based upon Exhibit 3 in the main report, p. 39. The source of the figures is CRI's financial survey of recording companies, which is explained in detail later in this appendix under "Exhibit S".

Exhibit D -- Mechanical Royalties Outpace Inflation and Median Family Income, 1963-1973

These data are also based on Exhibit 3 in the main report, p. 39. Data pertaining to the Consumer Price Index and Median Family Income are from the Statistical Abstract of the United States.

Exhibit E -- Mechanical Royalties Paid Per Released Luis Outpace Inflation and Median Family Income, 1963-1972

These data are based upon the analysis in Exhibit 4 of the main report, p. 43. The assumptions behind the exhibit are discussed later in this technical appendix under "Exhibit 4".

Exhibit F. -- Payments to Copyright Owners Would Go Up \$47 Million

The finding is explained on pages 56-60; the underlying data are to be found in Exhibits 6 and 7, which are discussed in this appendix. Suffice it to say here that the \$47 million figure does not assume that all licenses would be paid at 3¢. It is based on the study finding that the existing rate structure, with standard discounts off the statutory rate, would prevail -- but at a higher plateau for all rates. This study finding is explained in Section II.E. of the full statement.

Note that the increase in mechanical royalties paid would be more than the simple 50% achieved by raising the rate from 2¢ to 3¢ because of the effect of the proposed playing time provision in Sec. 115 of H.R. 2223. (See Exhibit 6.)

Exhibit G -- Annual Cost to Consumers Could Go Up By \$100 Million

Calculation of the increase -- more precisely \$97.6 million -- is shown in Exhibit 10, page 67. Note that the increase to Consumers is considerably more than the \$47 million increase to recording companies. The logic for this is explained in this Technical Appendix under Exhibit 9.

Exhibit H -- Breakeven Point Higher Than Ever

These data come directly from Exhibit 13 of the main written report, p. 74. The source of that exhibit, a study conducted by Cambridge Research Institute in 1972, is discussed father in this appendix under "Exhibit 13".

Exhibit I -- Rates Paid are Statutory Rate and Standard Variations

These percentages are computed directly from Exhibit 21, p. 118, which is discussed in full later in this Technical Appendix.

Exhibit J :- In 1974 as in 1963 Tunes Were Licensed at 2¢ or Standard Variations

The right-hand side of this exhibit is computed from Exhibit 21, p. 118. There, it will be seen that 21 of the 2,593 tunes studies which had paying

licenses, were paid at rates other than standard variations. This amounts to 0.8% of the tunes sampled.

The left-hand side of Exhibit J is taken from the 1965 Statement of John Desmond Glover on H.R. 4347 Section 113 (c) (2).

Exhibit K -- No Economic Justification for an Increase

This exhibit restates the conclusions of Exhibit A.

exhibits.

This concludes the section of the Technical Appendix covering the Summary

FULL STATEMENT EXHIBITS

This section of the Technical Appendix documents in detail the sources. and methodology for the exhibits in the full statement, pp. 33-118.

Exhibit 1 -- STATUTORY LICENSE ROYALTIES AND RECORD COMPANY PRICES: 1909 vs. 1974

Sources for the price information cited in the exhibit are given in the footnotes to the exhibit. The financial survey cited in footnote "b" is explained in detail later in this appendix under "Exhibit 5".

Exhibits 2 & 3 -- INCOME TO COPYRIGHT OWNERS FROM RECORDINGS, 1973 vs. 1963

The data relating to mechanical royalties are explained in the "Sources" section at the bottom of Exhibit 3. The two CRI surveys that provided raw data are briefly described in footnote "a" of Exhibit 3, and are more completely discussed later in this appendix under "Exhibit 5".

Copyright owners' performance fee income from recordings was estimated as follows:

- Of \$37.5 million (FCC figures) in ausic license fees paid by radio stations and networks to copyright owners in 1973, 90% or \$33.8 million was estimated to be attributable to commercially produced sound recordings;
- . e Of \$47.8 mīllion (FCC figures) in music license fees paid by TV stations and networks in 1973 to copyright owners, 105 or \$4.8 million was conservatively estimated to be due to the use of sound recordings;
- Of \$19.4 million in ASCAP receipts in 1975 due to nonbroadcast general and background music, live symphonic and concert music, and royalties from foreign societies, 20% or \$3.9 million was estimated to be due to commercially produced recordings;
- e Finally, it was estimated that BMI and SESAC together also were accountable for about half of the ASCAP total for background music in 1973, or about \$1.9 million.

These estimates sum to \$44.4 million in copyright owners' income from performance fees attributable to sound recordings, an increase of 283% over the level of 1963, as reported in the 1965 Glover Statement.

In terms of the estimated mechanical royalties, it will be noted in footnotes "a" and "b" of Exhibit 3 that there are two estimates provided. The footnotes indicate that the two estimates are from different surveys, and it explains our rules for the use of each. The lower estimate (\$77 million in 1973 and \$79 million in 1974) is from a lengthy financial survey which was first conducted by CRI in 1973 and later updated in 1974 and 1975. It is discussed in detail below under the notes to Exhibit 5. The higher estimate is from a short, special 34-company survey which CRI conducted in 1975 in order to obtain the most recent information on mechanical royalties paid. It was conducted as follows:

A two-question survey was sent to 96 record companies in early 1975. The companies comprised all those member firms of the Recording Industry Association of America plus an approximately equal number of presumed prospective members. Thirty-four companies responded. Those who did not respond did so for a variety of reasons -- some were no longer in business, others had merged or had been acquired, and many were inactive and had no sales during the period. When compared with RIAA industry sales estimates, it appeared that the 34 respondents represented close to 98% of industry sales -- and hence, mechanical royalties paid. Thus the figure of \$83 million for mechanical royalties paid in 1974 is a highly reliable number.

On the next four pages following, the memorandum introducing the short survey, the one-page questionnaire, the names of the respondent firms, and the raw survey results are provided.

MEMORANDUM

December 2, :1974

TO:

Record Companies

FROM:

Cambridge Research Institute, Cambridge, Massachusetts

Telephone: (617) 492-3800

SUBJECT:

1973 and 1974 Statistics on Mechanical Fees Paid by the

U.S. Record Industry

During recent Senate hearings on the Copyright Revision Bill, questions were raised about the total amount of mechanical fees paid by the record industry. In order to illustrate the severe impact on the record industry of raising mechanical fees from 2¢ (under existing copyright law) to 3¢ (under the copyright bill passed by the Senate in September 1974), there is an urgent need to collect statistics on the mechanical fees paid by as many record companies as possible. Could you, therefore, please fill in the attached questionnaire and return it by January 15.

The following procedure has been established so your company's financial data will be handled in a confidential manner:

- After you have completed the enclosed form keep one copy for your files and send one copy to the CPA firm of J. K. Lasser & Company, 666 Fifth Avenue, New York, New York 10019. (You may use the preaddressed envelope that is enclosed.)
- As you will notice, your forms have been pre-coded with a company number known only to Cambridge Research Institute. The CPA firm of J. K. Lasser & Company will not know the name of your company. In this way, your company's name will not be associated with your financial data.
- The financial data you send to the accountants will be combined with data from other firms, which will prevent disclosure of individual company information. Your reporting forms will be destroyed.

RIAA SURVEY OF MECHANICAL FEES PAID BY RECORD COMPANIES IN 1973 AND 1974

Send form to:
Ms. Millicent Hauser
J.K. Lasser & Co.
666 Fifth Avenue
New York, N. Y. 10019

Questions may be referred to: Mrs. Carol Cerf Cambridge Research Institute Telephone (617) 492-3800 Cambridge, Mass. Company Code Number

Only financial statistics on record and tape operations in the United States should be supplied.

(in \$1,000's)

		, ,		
	Jan-June 1973	July-Dec. 1973	Jan June 1974	July-Dec. 1974*
Net Sales of Records and Tapes	-			
(All domestic and export sales to retail or wholesale organizations, including sales to but not by record clubs, and including sales through any wholly owned sales subsidiary. From gross sales, should be deducted returns, exchanges, allowances, cash discounts, state excise taxes, and bad debts, including bad debts arising from record club operation.)				
Mechanical Fees				
(All mechanical fees paid to music copyright holders either directly or through agents.)				

* These figures can be estimates if necessary, but please indicate if they are.

PLEASE MAIL THIS INFORMATION BY JANUARY 15, 1975.

Record Companies Which Responded to the Questionnaire Entitled "RIAA SURVEY OF MECHANICAL FEES PAID BY RECORD COMPANIES IN 1973 and 1974"

ABC/Dunhill Records
Alshire International, Inc.
A & M Records, Inc.
Ansonia Records
Arista Records

Atlantic Recording Corp.
Bee Gee Records
Buddah Records
Capitol Records, Inc.
Challenge Records

Cinnimon, c/o Goldband Records Columbia/Records Group Disneyland/Vista Records Elektra/Asylum/Nonesuch Records GNP Crescendo Records

GRT Corporation
Hickory Records, Inc.
Icka-Delick-Music & Records Corp.
London Records
Longines-Symphonette Recording Society

MCA Records, Inc.
Mill City Records
Nashboro Records
Phonogram, Inc.
Pickwick International, Inc.

Polydor, Inc.
RCA Records
Savoy Records, Inc.
Sussex Records
20th Century Records

United Artists Music & Records Group, Inc. Thomas J. Valentino, Inc. Warner Bros. Records Word Records

RESULTS

RIAA SURVEY OF MECHANICAL FEES PAID BY RECORD COMPANIES IN 1973 AND 1974 131

Send form to:

Ms. Millicent Hauser
J.K. Lasser & Co.
666 Fifth Avenue
New York, N. Y. 10019

Questions may be referred to: Mrs. Carol Cerf Cambridge Research Institute Telephone (617) 492-3800 Cambridge, Mass.

Company Code Number

Only financial statistics on record and tape operations in the United States should be supplied.

(in \$1,000's)

	Jan-June 1973	July-Dec. 1973	JanJune 1974	July-Dec. 1974*
Net Sales of Records and Tapes	503.0	482.6	535.6	580.0
(All domestic and export sales to retail or wholesale organizations, including sales to but not by record clubs, and including sales through any wholly owned sales subsidiary. I om gross sales, should be deducted returns exchanges, allowances, cash discounts, state excise taxes, and bad debts, including bad debts arising from record club operation.)	•			
Mechanical Fees	39.6	40.8	41.3	42.2
(All mechanical fees paid to music copyright holders				-

(All mechanical fees paid to music copyright holders either directly or through agents.)

* These figures can be estimates if necessary, but please indicate if they are.

PLEASE MAIL THIS INFORMATION BY JANUARY 15, 1975.

Exhibit 4 -- STATUTORY MECHANICAL ROYALTIES PAID PER RELEASE OF RECORD TUNES: 1963 vs. 1972.

Exhibit 4 represents an attempt to estimate the mechanical royalties which one release of a typical tune will gather in a year's time. It takes the total sun of mechanical payments in each of the comparison years and divides the sum by total tunes released as reported by <u>Billboard</u>. Such an estimate ignores royalties paid on tunes released in previous years. However, RIAA studies show that the vast majority of record sales are of records which have been on the market for 90 days or less; consequently, the vast majority of mechanical royalties are paid on recent releases. Furthermore, the Rillboard release data, as mentioned in footnote "c" in the Exhibit, by counting all releases issued, even if the same tune is on more than one release overstate the number of unique tunes released. These two errors of estimation should roughly cancel one another.

Exhibit S -- ESTIMATED FINANCIAL STATISTICS AND INCOME STATEMENT FOR THE U.S. RECORDING INDUSTRY, 1955-1974 (PARTS: A, B, C, & D).

Data presented in Exhibits 5A, 5B, 5C and 5D are based on a lengthy financial survey of recording companies which CRI conducted in 1973 and then updated in 1974 and 1975. The survey represents an important source of statistical information on the recording industry used in the full statement, and was conducted as described below.

Design of the Sample

The survey was distributed among all 55 member firms of the Recording Industry Association of America in 1973. It was determined in advance that limiting the survey to these firms was the most appropriate and convenient way of assuring cooperation of the respondent firms within the constraints of time and funds available.

CRI encouraged as many of these member firms as possible to respond to the lengthy questionnaire, under the assurance that individual company responses would be strictly confidential. Indeed, CRI itself was not privy to individual questionnaires; the results were tabulated by the CPA firm

of J.K. Lasser and Co. In this manner, full responses were received from 13 firms. As spelled out in Exhibit 5-D in the main report, these 13 firms represented 16 of the 19 firms in the Glover report of 1965, as three had merged in the interim period. This overlap provides acceptable reliability for year-to-year comparisons.

The questionnaire itself was designed with great care, in consultation with financial executives of various recording firms. In this way, it was assured that proper financial categories and definitions were employed, and that the questions asked could be answered. The questionnaire was similar to the one employed for the survey reported in the 1965 Glover report.

Representativeness of the Sample

For years 1967 to 1974, inclusive, financial survey data was provided, as follows:

1974		13	companies
1973		. 13	companies
1972		· 13	companies
1971		13	companies
1970	ı	12	companies
1969		- 10	companies
1968	•	8	companies
1967		7	companies

All 13 companies reporting for years 1971-74 were unable to report for the full period 1967-74 because some were not in business for the full period; some did not maintain the requisite historical data; and still others were participants in mergers and acquisitions rendering historical data misleading or unavailable.

The survey encompasses firms which account for a low of 43.0% of industry sales in 1968 and a high of 63.8% in 1974. Such large sample size works to make sample results representative of the universe even when the sample is not known to be random in a scientific sense, as is the case here. Moreover, the data presented are as representative as it was possible to obtain.

Thoroughness of the Survey

The survey, as conducted, is the most thorough and comprehensive study of the financial condition of the recording industry that has ever been undertaken (with the exception of the earlier survey we conducted for the 1965 hearings) or that is available from any source.

The materials associated with this lengthy financial survey are provided in the following pages in four parts:

PART I: Instructions to Companies Responding to the

1973 Survey.

PART II: The 1973 Questionnaire Forms.

PART III: The 1974 Update of the Survey - Questionnaire

Forms.

PART IV: . Consolidated Financial Statement of the

Surveyed Companies.

PART T

135

1973 SURVEY OF RECORDING COMPANIES: INSTRUCTIONS FOR COMPLETING QUESTIONNAIRE

MEMORANDUM

January 15, 1973

TO:

Companies in the Record and Tape Manufacturing Industry

FROM:

Cambridge Research Institute, Cambridge, Massachusetts

Telephone: (617) 864-1350

SUBJECT: Instructions for Completing Financial Reporting Forms

The purpose of gathering financial data from your firm and others is to develop a detailed financial picture of the record and tape manufacturing industry as a basis for analyzing the economic effects of proposed changes in the copyright law. This analysis will be presented during Congressional hearings concerning the copyright law. In order to prepare properly for hearings in mid-March, we need these forms to be completed and returned by February 9th. Many companies participated in a similar survey in 1965, preparatory to Congressional hearings at that time.

The following procedure has been established so your company financial data will be handled in a confidential manner:

- After you have completed the enclosed forms, keep one set for your files and send one set to the CPA firm of J. K. Lasser & Company, 1790 Broadway, New York, New York 10019. (You may use the preaddressed envelope that is enclosed.)
- 2. As you will notice, your forms have been pre-coded with a company number known only to Cambridge Research Institute. The CPA firm of J. K. Lasser & Company will not know the name of your company. In this way, your company's name will not be associated with your financial data.
- 3. The financial data you send to the accountants will be combined with data from other firms, which will prevent disclosure of individual company information. Your reporting forms will be destroyed, although you may wish to save your copy of the forms.

Memo to: Companies in Record and Tape Manufacturing Industry January 15, 1973

In filling out the forms, please follow these two basic requests:

-2-

- A. If you believe something will not be clear, please add explanatory notes. The accountants will then have the information necessary to arrange data in a fashion comparable to other reports.
- B. If, where detailed information is requested and consolidated information is all that you have available, estimate the amounts attributable to the specific accounts. Where entries are estimated, please indicate the basis for your estimates.

As you will note, there are six (6) reporting forms:

- (1) Summary Report
- (2) Cost of Goods Sold Report
- (3) Balance Sheet
- (4) Distribution of Sales
- (5) Break Even Analysis
- (6) Selected Marketing Data

Information should be provided on a calendar year basis, if possible. If information is available only on a fiscal year basis, please indicate on what date your fiscal year ends. Also, indicate any changes in fiscal years that occurred during the 1965-1972 period.

If you were not in business for any year between 1965 and 1972, please note this fact under the appropriate year(s). If for any other reason it is not possible to report data for a year--even on a best estimate basis. (Please try, of course)--write in the reason under the appropriate year(s).

Our goal is to develop a consistent financial picture of record and tape manufacturing operations in the United States. For this purpose, record and tape manufacturing is defined as the production and manufacturing of recordings, whether on records or tapes, and their sale to distributive organizations. To anticipate some of your questions, general comments are included for each account on the financial reporting forms which are attached.

If you have any questions, please contact Walter J. Campbell at Cambridge Research Institute, telephone (617) 864-1350.

EXMIDIT 5; CONT.

137

Memo to:

Companies in Record and Tape

Manufacturing Industry

January 15, 1973

(1) SUMMARY REPORT and (2) COST of GOODS SOLD REPORT (Comments on Accounts)

-3-

.Gross Sales

'(Gross sales should include all domestic and export sales of records and tapes. Since record clubs are being considered as "retailing" or "distributing" operations for our purposes, sales to, not by, record clubs will be reported in gross sales just as sales made to any other type of distributive organization. If your company sells through a wholly owned sales subsidiary, sales, as well as the expenses of your sales subsidiary, should be included in your financial reporting of record manufacturing operations. If your company sells or markets records through partially or wholly owned distributors, financial results of the astributor organization would not be reported, although sales to distributors would be. In addition, income from activities other than record manufacturing, such as publishing, should not be included in the financial reporting forms, although income from leased facilities or custom pressing of records for others will be accounted for in other accounts.)

Less: • Returns

(Include all returns on shipments regardless of whether the returns are then dumped or destroyed.)

Exchanges, Allowances, Cash Discounts,
 Bad Debts, State Excise Taxes

(These items will : deducted from Gross Sales to arrive at a net sales figure.)

(Bad debts arising from record club operation should be included in this account. Record club bad debts are included in record manufacturing operations so as to avoid a misleading picture of bad debts in those cases where record manufacturers sell to their own record clubs and hence avoid the bad debts associated with these sales.)

(Also, for 1965 include any Federal excise taxes paid and footnote the amount.)

Memo to:
Companies in Record and Tape
Manufacturing Industry

January 15, 1973

(1) and (2) cont'd

Gross Sales (Continued)

Net Sales

(Self-explanatory)

Cost of Goods Sold (Details of C of GS are on Form #(2))

A&R Costs

(These costs would be the salaries and expenses of the A&R Department in your company and/or wages paid to part-time A&R personnel.)

Studio Costs

(Salaries of engineers and technicians and costs of studio facilities would be included in this account. Such costs usually include editing and manufacture of a so-called "lacquer". If your firm owns studios which are leased to others, then income derived from this activity should be deducted from your Studio Costs. If your firm does not own a studio but leases studios owned by others for recording sessions, your leasing costs would be included in this account.)

Recording Session Costs

(These costs are often referred to as talent costs and include all payments made to musicians, vocalists, leaders, arrangers, orchestrators; copyists or other "talents",

Artists' royalties should not be included. Also, any advances against royalties and any unrecoupable flat payments to the artist should not be included.)

Artists' Royalty Payments

(Self -explanatory)

-5-

iemo to:

January 15, 1973

Companies in Record and Tape Manufacturing Industry

(1) and (2) cont'd

Cost of Goods Sold (Continued)

· Unrecouped Advances to Artists

(Self-explanatory)

Unrecoupable Flat Payments to Artists:

(Any special lump sum or flat or bonus payments to the artist which are unrecoupable and unrelated to direct sales performance.)

AFTRA Payments

(Payments to the Union's pension fund)

AF of M Payments

(Payments to the Union's pension fund)

Actors Equity Association Payments

(Payments to the Union's pension fund)

MPTF

(All payments to the trustees of this fund, including the U.S. Trust Company portion.)

Purchased or Leased Masters

(In some instances, record companies purchase or lease masters produced by others, often by independent A&R men. The total cost of any purchased or leased masters, including royalties, if any, should be included in this account.)

Art Department Costs

(This is the cost of an in-house art department, or fees paid for outside art services (directly or through a producer) for use on album jackets or any other related art work.)

-6-

Exhibit 5, cont.

140

Memo to: Companies in Record and Tape Manufacturing Industry January 15, 1973

(1) and (2) cont'd

Cost of Goods Sold (Continued)

Manufacturing Costs

(This includes all the labor, material, and manufacturing overhead costs associated with the reproduction of records and tapes packed ready for shipping. For companies manufacturing records or tapes for others, a net figure should be shown, i.e., manufacturing costs, less income from records or tapes manufactured for others. Companies paying for records or tapes manufactured by others should include these costs in the purchased record account shown below.)

Shipping, Transportation, and Warehousing.

(Please estimate these costs, if necessary.)

Research and Development Costs

(A few companies expend funds in efforts to improve the state-of-the-art of sound reproduction. Such expenses should be identified in total here.)

Purchased Records

(In some instances, record companies purchase records or tapes manufactured by others. The manufacturing portion of this cost, as defined above, should be included here. If payments made also include payments for purchased masters, those portions of portions of payments for purchased masters should be included under the Purchased Master account.)

Other Costs

(All other costs not included above except mechanical license fees.)

Memo to:

-7-

January 15, 1973

Companies in Record and Tape
Manufacturing Industry

(1) and (2) cont'd

Cost of Goods Sold (Continued)

Mechanical License Fees

(All mechanical royalty payments to music copyright holders made directly or through agents to publishers and/or composers and lyricists.)

Total Cost of Goods Sold (Final number on Form # (2))

(Self-explanatory)

Gross Profit

(Self-explanatory)

Expenses

Selling, Advertising and Promotion

(These expense categories can be combined. Remember, if your company has a wholly owned sales subsidiary, include the costs of the subsidiary in this account.)

Géneral Administrative

(Interest expenses, if any, would be picked up here.)

Total Operating Expenses

(Self-explanatory)

Gross Profit Less Operating Expenses

(Self-explanatory)

Other Income

(This would include all foreign royalties. Does not include net profits from record club operations. Income for leasing of studio facilities is not included here. Income from

. 142

Memo to:

-8-

January 15, 1973

Companies in Record and Tape
Manufacturing Industry

(1) and (2) cont'd

Other Income (Continued)

publishing is not included. In general, any income from non-record-related activities is not included.)

Net Operating Profit Before Depreciation

(Self-explanatory)

Less: Depreciation

(Total depreciation account on plant and equipment.)

Net Profit Before Taxes

(Self-explanatory)

Income Taxes

(If direct tax payments are not available, please estimate income taxes as they would apply to an independent record and tape manufacturing operation.)

Net Profit After Taxes

(Self-explanatory)

Note: Please round all figures to nearest thousand.

143

Memo to:
Companies in Record and Tape
Manufacturing Industry

January 15, 1973

(3) BALANCE SHEET (Comments on Accounts)

-9-

(To the extent estimates are used, all items should be directly related to the functions of manufacturing of recordings, whether on records or tapes, and selling these products to distributive organizations. Thus, the balance sheet figures should accurately reflect the level and mix of assets, liabilities and net worth required to produce the profit and loss statement submitted in the form (1) SUMMARY REPORT.

Cash

(All cash and near cash items)

Accounts Receivable

(Trade credit extended arising from the manufacture and sales of records and tapes to distributive organizations)

Inventory

(Records, tapes, supplies, etc., that result from manufacturing and selling tapes and records to distributive organizations)

Total Current Assets

' (Self-explanatory)

Fixed Assets

(All plant and equipment related to manufacturing and selling tapes and records to distributive organizations)

Less: Accumulated Depreciation

(Indicate depreciation method and any change in method in a footnote)

Net Fixed Assets

(Self-explanatory)

144

Memo to:

-10-

January 15, 1973

Companies in Record and Tape
Manufacturing Industry

(3) cont'd

Other Assets

(All other assets not included above which relate to record and tape manufacturing)

Total Assets

(Self-explanatory)

Current Liabilities

(All liabilities due in one year that result from manufacturing and selling records and tapes to distributive organizations)

Long Term Debt

(Any long term debt actually carried on the books of the record company or the record company's estimated share of the debt carried on the books of the division to which it belongs)

Other Liabilities

(Any other liabilities related to record and tape manufacturing)

Total Liabilities

(Self-explanatory)

Net Worth

(Independent record companies should indicate their net worth, i.e., stockholder's net capital, including retained earnings and surplus. In cases where activities are engaged in other than those covered by this survey, a best estimate of net worth related to record and tape manufacturing operations should be made.)

Total Liabilities and Net Worth

(Self-explanatory)

Note: Please round all figures to the nearest thousand.

145

Memo to: '-11Companies in Record and Tape
Manufacturing Industry

January 15, 1973

(4) BREAK EVEN ANALYSES (Comments on Items)

For each of the five product categories listed in the form, please estimate for all records and tapes released in 1971:

- (1) the average factory selling price per record and per tape;
- (2) the variable costs per record and per tape;
- (3) the average fixed costs per release; and
- (4) the required number of records and tapes, respectively, which have to be sold to recover the average fixed costs per release, i.e., to "break even".

Variable costs are those costs which vary directly with the volume of records and tapes which are manufactured and sold. Fixed costs are those costs incurred regardless of the volume of units manufactured and sold. For example, all royalties, fund payments, and license fees vary with the level of units manufactured and sold. Also, a substantial portion of manufacturing costs (e.g., labor and supplies) may vary with the level of units manufactured and sold. However, probably most A&R, studio, recording, and talent costs and most selling promotion and general costs do not vary with the level of units manufactured and sold, and would be accounted for on a per release basis and allocated to one of the five sales categories.

Any allocation of fixed costs the five product categories should be based on the total number of releases for each category. This procedure will, for example, attempt to allocate to tapes some proportion of overhead that otherwise might be charged entirely to LP's.

146

January 15, 1973

Memo to:
Companies in Record and Tape
Manufacturing Industry

(5) DISTRIBUTION OF SALES (Comments on Items)

Please indicate the total number of releases issued by your company during 1971 in each of the five product categories listed below. Please also show the breakdown of each of the five totals in terms of the unit sales categories shown in the first column. For example, show the number of releases on 45's with sales of less than 2,000 with sales of from 2,000 - 3,999, and so forth. Note that the unit sales categories are for years 1971 and 1972 in total (in order to capture not less than a full year's sales, even for releases issued in December 1971).

(6) SELECTED MARKETING DATA

(Self-explanatory)

Note: Please round all figures in (6) to nearest thousand where 000's on \$ or units are requested.

BY FEBRUARY 9th
PLEASE COMPLETE AND FORWARD
THE ENCLOSED FINANCIAL REPORTING FORMS
TO

Mr. Howard Wiener
J. K. Lasser & Company (CPA's)
1790 Broadway
New York, New York 10019

PART 2

1973 SURVEY OF RECOFFING OCTANIES: QUESTIONDAINS

(1) SUMMARY REPORT

Questions May Be Referred To:
Walter J. Campbell
Cambridge Research Institute
Telephone: (617) 864-1350
Cambridge, Massachusette

Send Forms To: Mr. Howard Wiener J.K. Lasser & Company (CPA's) 1790 Rzoadway New York, New York 10019

(1) SUMMARY Company Code No.

Manufacture and Sales of Phonographic Records and Zapas

FINANCIAL REPORTING FORMS

(\$,000\$)

	1965	1966	1967	1968	1959	1970	1971	1972
				Ì			4	
Gross Sales								,
Less: Returns	`							
Less: Exchanges, Allowances, Cash Discounts, Bad Debts & State Excise	*	•						
N S S S S S S S S S S S S S S S S S S S								
Tases Cost of Goods Sold (From C of GS Form)								
					•			
Cross From Adventising & December.								
Town Canaral and Administrative								
Total Oceanies Consessed			٥					,
Canes Denfit Less Oversting Expenses								
Other forms								
Not Occupied Before Depreciation								
Taber Depreciation		٠.					,	
Net Drofft Before Taxes						,		,
focome Taxes								
Not Describe After Taxes							,	
West Court Aires 4 three								

*Includes 1965 Federal excise taxes of \$_

Note: Please round all figures to nearest thousand.

	2	(2) COST of GOODS SOLD	JICS SOOS		-			
Send Forms To: Mr. Howard Wiener J. K. Lasser & Company (CPA's) . 1790 Broadway New York, New York 10019	Ouest Wast	Questions May De Referred To: Walter J. Campbell . Cambridge Research Institute Telephone: (617) 864-1350 Cambridge, Massachusetts	Referred 1' pbell tearch Instit (7) 864–1350		·	Company	Company Code No.	d sold
Menu!	FINANCIAL REPORTING FORMS Manufacture and Sales of Phonographic Records and Tapes (\$000's)	FINANCIAL REPORTING FORMS nd Sales of Phonographic Records (\$000's)	ORTING FO	ORMS ords and Taj		,	•	
Years	1965	1966	1961.	1968	1969	1970	1971	1972
A & R Costs								·
Studio Costs						•		,
Recording Session Costs		·						
Artists Royalty Payments	,							
Unrecouped Advances to Artists		Ì				,		
Unrecoupable Flat Payments to Artists								
AFTRA Payments		٠						
AF of M Payments		,						
Actors Equity Association Payments							,	
MPTF Payments								
Purchased Masters								
Art Department Costs								
Manufacturing Costs								
Shipping, Transportation & Warehousing				,			•	
Research and Development Costs	-					1		
Purchased Records								
Other Costs .						· .		
-	,			*				
Mechanical Fees	٠		*					
TOTAL COST OF GOODS SOLD		,		•		i	•	
Note: Please round all figures to nearest thousand,	.pag					†. '		148

Questions May Be Referred To: Walter J. Cambbull Cambridge Research Institute Telephone: (617) 864-1350 Cambridge, Massachusetts FINANCIAL REPORTING FORMS Manufacture and Sales of Phonographic Records and Tapes (end of year - in \$000's) 1965 1966 - 1967 1968 1969	Exhibit 5, cont.	•	(3) BALANCE SHEET	CE SHEET		-			
FINANCIAL REPORTING FORMS Manufacture and Sales of Phonographic Records and Tapes (end of year - in \$000's) Final Current Assets 1965 1966 1967 1968 1969 Outy	Send Forms To: Mr. Howard Wiener J. K. Laguer & Company (CPA's) 1790 Broadway New York, New York 10019	Dues ¥ Ø H O	tions May Be alter J. Cam ambridge Re- elephone: (61	Referred The Reserved The Reservent Institute 1350 (Assessed Institute Research Re	o: .ui.e		Company	·Company Code No	Code No.
Years 1965 1966 1969 1969	PA1	FINA anufacture and S	ANCIAL REF ales of Phone and of year -	PORTING FC ographic Rec in \$000's)	R.MS ords and Ta	800			
Other Conference Confe	Years	1965	9961	1	1968	1969	1970	1971	1972
	Cash								
		•							
	•								,
Fixed Assets	Total Current Assets	,							•
Long Torm Debt Cother Liabilities Total Liabilities (Cother Liabilities)	Fixed Assets	·						,	-
Other Assets . Other Assets . Total Assets . Current Liabilities . Long Torm Debt . Other Liabilities . Total Liabilities . Total Liabilities . Total Liabilities .	Less: Accumulated Depreciation			,				. **	F-14
Other Assets Total Assets Current Liabilities Long Torm Debt Other Liabilities Total Liabilities Net Worth	Net Fixed Assets				•				
Total Assets Current Liabilities Long Torm Debt Other Liabilities Total Liabilities Net Worth	Other Assets	-	•				4.4	,	,
Courrent Liabilities Long Torm Debt Other Liabilities Total Liabilities Net Worth	Total Assets			-					
Long Torm Debt Other Liabilities Total Liabilities Net Worth	Current Liabilities								
Cother Liabilities Total Liabilities Net Worth	Long Torm Debt								
Total Liabilities Net Worth	Other Liabilities	,					•		
Net Worth	Total Liabilities								
Trans I Intilities 6 Not Warnt	Net Worth	-					•	•	
1 Oldi Liabilitias & Mat Hottii	Total Liabilities & Net Worth								

Note: Please round all figures to nearest thousand.

(4) BREAK EVEN ANALYSIS

Sand Forms To: Mr. Howard Wiener	Questions May Be Referred To:	Comizany Code No.
J. K. Lasser & Company (Cr. 3) 1790 Broadway New York, New York 10019		(4) BREAK EVEN

(4) BREAK EVEN ANALYSIS

FINANCIAL REPORTING FORMS

Manufacture and Sales of Phonographic Records and Tapes

		(\$'s except #5 which is in units)	ot #5 which	is in units)	
	45.	Popular* L.P's	Classical LP's	Popular* Tapes	Classical . Tapes
			*	,	
1. Net Factory Salling Price Per Record					
2 1 s. 4 Total Variable Costs Fer Record					
A artists rovalties		,			
. find navments					
e convright license fees					
variable manufacturing and shipping costs		•			
. variable A&R, studio recording, and talent costs	sta				
e variable selling, promotion and general costs	٠				
(2 - 1) signal purp product (1 - 2)					
3. Contribution to Fixed Overingad Ania Front (1					
4. Average investment In Fixed Overhead Per Release	9		٠		
a fixed ALR. etudio recording and talent costs	Ĺ				
a unrecouned artist royalties and bonus payment					
e .fixed manufacturing and shipping costs.					
. fixed selling, promotion and zeneral costs					
a fixed denraciation costs					•
Donner Which House Mr Ra		_			
5. Required number of Recoids make into 20 20	-				
Average Investment in Fixed Overhead Per Release	•				
(1.7.3)					

*Popular = all non-classical releases.

Exhibit 5, cont.

	Company Code No. (5) DISTRIBUTION OF SALES
(5) DISTRIBUTION OF SALES	Questions May Bc Refurred To: Walter J. Campbell Cambridge Research Institute Telephone: (617) 864-1350 Cambridge, Massachusetts
•	Send Forms To: Mr. Howard Wiener J.K. Lasser & Company (CFA's) 1790 Broadway New York, New York 10019

FINANCIAL REPORTING FORMS

Manufacture and Sales of Phonographic Records and Tapes

			(Units)		
	•	Number of	· Number of Titles Roleased in 1971	sed in 1971	•
Sales in Units for 1971 and 1972	45's	Popular [¢] Classical LP's LP's	Classical LP's	Popular¢ Classical Tapes Tapes	Classical Tapes.
Total			,		,
0 - 1,999		,		·	
. 2,000 - 3,999			•		
4,000 - 5,999					
6,000 7,999					
8; 000 - 9, 999					
. 10,000 - 19,999				,	
20,000 - 49,999					,
. 50,000 - 99,999	•				,
100,000 - 299,999	•	•			-
300,000 - 599,999		•	,		
. 660,000 - 660,000		•			
1, 000, 300 or more	,				

*Popular * all non-classical releases.

e												_											, .								15
MARKETH	6.3	7 1	1972															•													
Code No	DATA	1 age 1	1971.									•						,													
Company			1970													,								,				,			
			1969		•			1		,						1	, ,												,		
OATA o: ute		ORMS	1968			•																								ì	
REFERENCE I Referred T pbell rearch Instit 7) 864-1350	assachusett	ORTING FO	1967								•	•	-														•				
ECTED MA ions May Be lter J. Cam mbridge Res lephone: (61	mbridge, M	NCIAL REP	1966	٠	-						*4.		•	,		_			, -			-			-	_				-	
(6) SEI Questi Wal	Š	FINA	1965									•	-							1	•							-			
	_	•			s Listing		-			, ,	es Listing							· Pi		+			-							_	
any (CPA's)	10019-			ice for 45's	ice For LP'						ice For Tap			,				Manufacture	turns) (000	-	•										
o: rd Wiener ser & Comp	New York			Factory Pr	Factory Pr	or less	, ,		,	or more	Factory Pr		or less .	ý		* * * -*	or more	of Records	(Before Re	100000	38 or less	98	38	86	8 or more	Listing At:	98 or less	86	38	. 86	\$8.98 or more
nd Forms I. Mr. Howa: J. K. Las: 1790 Broag	New York.			1. Average	2. Average	• \$2.98	• \$3.98	• \$4.98	• \$5.98	e \$6.98	3. Average	At:	• \$4.98	• \$5.98	\$6.98	• \$7.98	● \$8.98	. Number	And Sold	45.8	\$25.5	\$3.5	\$4.5	\$5.5	\$6.9	. Tapes	\$4.	\$5.4	\$6.	\$7.	\$8.
	(6) SELECTED MARKETING DATA Questions May Be Referred To: Walter J. Campbell Cambridge Research Institute Telephone: (617) 864-1350	Wiener Walter J. Campbell Cambridge Research Institute Telephone: (617) 864-1350 Cambridge, Massachusetts (6) SEI Company Company C	Wiener Walter J. Campbell T. & Company (CPA's) Walter J. Campbell Cambridge Research Institute Telephone: (617) 864-1350 Cambridge, Massachusetts FINANGIAL REPORTING FORMS	Wiener Questions May Be Referred To: Questions May Be Referred To: Walter J. Campbell Cambridge Research Institute Telephone: (617) 864-1350 Gambridge, Massachusetts FINANCIAL REPORTING FORMS 1965 1966 1967 1969 1970	Wiener Questions May Be Referred To: Walter J. Campbell Tay Cambridge Research Institute Telephone: (617) 864-1350 Telephone: (617) 864-1350 FINANCIAL REPORTING FORMS 1965 1966 1967 1969 1970	Wiener Walter J. Campbell T. Campridge Research Institute T. Cambridge Research Institute T. Cambridge Massachusetts T. Camp T. C	Wiener Walter J. Campbell R. Company (CPA's) Walter J. Campbell Gambridge Research Institute Telephoidge Research Institute To Cambridge, Massachusetts FINANCIAL REPORTING FORMS actory Price for 45's actory Price For LP's Listing less	Wiener Walter J. Campbell R. Company (CPA's) Walter J. Campbell Gambridge Research Institute Telephone: (617) 864-1350 Tele	Wiener Walter J. Campbell Cambridge Research Institute Telephone: (617) 864-1350 Telephone: (617) 864-1350 Telephone: (617) 864-1350 Telephone: (617) 864-1350 Telephone: (617) 864-1360 Telephone: (617)	Wiener Walter J. Campbell Cambridge Research Institute Telephone: (617) 864-1350 Telephone: (617)	Wiener Questions May Be Referred To: Walter J. Campbell Cambridge Research Institute Telephone: (617) 864-1350 Telephone: (617) 864-1360 Telephone: (6	Wiener Questions May Be Referred To: Walter J. Campbell Cambridge Research Institute Telephone: (617) 864-1350 Gambridge, Massachusetts Telephone: (617) 864-1350 Telephone: (61	Wiener Questions May Be Referred To: Walter J. Campbell Cambridge Research Institute Telephone: (617) 864-1350 Gambridge, Massachusetts Telephone: (617) 864-1350 Telephone: (617) 864-1360 Telephone: (61	Wiener Weller J. Campbell R. Company (CPA's) Saw York 10019. Actory Price for 45's actory Price For LP's Listing More actory Price For Tapes Listing More actory Price For Tapes Listing Miener Financial Massachusetts Cambridge, Massachusetts Financial RePorting Forms 1965 1966 1967 1968 1969 196	Wiener Wiener Walter J. Campbell R. Company (CPA's) Televations May Be Referred To: Walter J. Campbell Gambridge Research Institute To and Didge Institute	Wiener Wiener Wiener Walter J. Campbell Walter J. Campbell Telephone: (617) 864-1350 Cambridge, Massachusetts FINANCIAL REPORTING FORMS 1965 1966 1967 1968 1969 1970 Iess Actory Price For LP's Listing more actory Price For Tapes Listing less watery Price For Tapes Listing Liess	Wiener Walter J. Campbell Te Company (CPA's) Walter J. Campbell Telephone: (017) 864-1350 Cambridge, Massachusetts FINANCIAL REPORTING FORMS 1965 1965 1965 1965 1965 1967 1969 1970 Timore Actory Price For LP's Listing Timore Actory Price For Tapes Listing Timore The Company CPA's Tapes Listing The Company CPA's Tapes Listing The Company CPA's Tapes Listing Timore Timore	Wiener Wiener Wiener Walter J. Campbell Washer J. Campbell Washer J. Campbell Washer J. Campbell Cambridge, Massachusetts Telephone: (617) 864-1350 Gambridge, Massachusetts FINANCIAL REPORTING FORMS 1965 1966 1967 1968 1969 1969 1969 1969 1969 1969 1969	Wiener Walter J. Cambbell Cambridge Research Institute Telephone: (617) 864-1350 Cambridge, Massachusetts FINANCIAL REPORTING FORMS 1965 1966 1967 1968 1969 1970 actory Price For LP's Listing Less Less Less Less Records Manufactured Records Manufactured Records Manufactured	Wiener Wiener Wiener Le Company (CPA's) Telephone: (617) 864-1350 Cambridge, Massachusetts Telephone: (617) 864-1350 Cambridge, Massachusetts Telephone: (617) 864-1350 Cambridge, Massachusetts FINANCIAL REPORTING FORMS 1965 1965 1967 1969 1970 Setory Price For LP's Listing Indre Actory Price For Tapes Listing Indre Actory Price For Tapes Listing Records Manufactured Before Returns) (000's)	Wiener Westions May Be Referred To: Questions May Be Referred To: Cambridge, Massachusetts Telephone: (617) 864-1350 Cambridge, Massachusetts FINANCIAL REPORTING FORMS 1965 1965 1965 1967 1969 1970	Wiener Wiener Wiener Wiener We Company (CPA's) We Company (CPA's) Wiener Wiener We Company (CPA's) We Company (CPA's) We Company (CPA's) We Combridge Research Institute Cambridge, Massachusetts Telephone: (617) 864-1350 Cambridge, Massachusetts FINANCIAL REPORTING FORMS 1965 1965 1965 1967 1968 1969 1970 1968 Innore Actory Price For Tapes Listing Actory Price For Tapes Listing Innore Records Manufactured Before Returns) (000's) Witing At: The Company Company (CPA's) Telephone: (617) 864-1350 Cambridge, Massachusetts Telephone: (617) 864-1350 Telephone: (618) 8	Wiener Questions May Be Referred To: Westions May Be Cambridge Research Institute Telephone: (617) 864-1350 Cambridge Massachusetts FINANCIAL REPORTING FORMS 1965 1966 1967 1969 1970 Items Records Manufactured Before Returns) (000's) Itimg At: Output Cambridge Research Institute Cambridge Research Institute Cambridge Research Institute Cambridge Research Institute Cambridge Massachusetts Cambridge Massachusetts FINANCIAL REPORTING FORMS 1966 1967 1969 1970 Institute Manufactured Before Returns) (000's)	Wiener Questions May Be Referred To: Walter J. Gumbell Telephone: (617) 864-1350 Telephone: (617) 8	Wiener Wener Welen Campany (CPA's) Telephone: [617] Walter J. Cambridge Research Institute Cambridge Research Institute Telephone: [617] Telephone: [618] Telephone: [Wiener Westions Wastions Wastions Wastions Wastions Wastions Wastions Wastions Cambridge Research Institute Cambridge, Massachusetts Telephone: [617] 864-1350 Telephone: [Wiener Composition Wiener Composition Wiener Composition Wiener Composition Wiener Composition Composition	Wiener Composition Wiener Composition Wiener Composition Wiener Cambridge Research To: Walter J. Campbell Cambridge Research Institute Cambridge Massachusetts 1965 1967 1968 1969 1970 1965 1966 1967 1968 1969 1970 1968 1966 1967 1968 1969 1970 1968 1966 1967 1968 1969 1970 1968 1966 1967 1968 1969 1970 1968 1969 1969 1970 1968 1969 1969 1970 1968 1969	Wiener Questions May Beformed To:	Wiener Compositions May Be Referred To: Questions May CPA's Table 1.966	Wiener Wiener Wester (6) SELECTED MARKETHIG DATA Questions May B Referred To: Questions May B Referred To: Walter J. Campbell Telephonel (6) 1964 1360 Telephonel (6) 1964 1360 Telephonel (6) 1967 1968 STINANCIAL REPORTING FORMS 1965 1965 1967 1968 Actory Price for LP's Listing Less Records Manufactured Before Returns) (000's) Willing At: or Inore Cambridge At: or Loss Or more Guesting At: or more Strong Price For Tapes Listing Or more Strong At: St

Exhibit 5, cont.

Exhibit 5, cont.	IS (9)	ELECTED, M	(6) SELECTED MARKETING DATA	ATA				
Serd Forms To: Mr. Howard Wiener J.K. Lasser-& Company (CPA's) 1790 Broadway New York, New York 10019	Q # ≱ Q ∺ Q	stions May Be Refer Walter J. Campbell Cambridge Researc Telephone: (617) 86 Cambridge, Massac	Questions May Be Referred To: Walter J. Campbell Cambridge Research Institute Telephone: (617) 864-1350 Cambridge, Massachusetts		Company Gode No. (6) SELECTE	pany Gode No. (6) SELECTED MARKETING DATA	TING DAT	ا نس
	1965	9961		1968	1969	1970	Page 2 of 2	of 2 1972
5. No. of Records And Tapes Returned Per Year			1					
		* .			•			
Tables		1 ,	•			·		
6. Total Costs of Handling Returns (\$000's)	•							
7. Number of Records And Tapes Manu- factured And Not Shipped (000's)		• •						
I.p.			,				-	
Tapes . T.	ļ					,		
8. No. of Multirecord LP Albums Sold (006's)	t	\$ •						
9. Payments to Radio Stations For Purchase of Radio Time to Advertise Records (200%)							ů,	
10. Expenditures on Co-op Advertising That Were Used To Purchase Radio Time (\$000s) Direct Purchase By Record Co.				-		,		,
• Estimate of \$'s Expended For Time Purchased By Outlets With-Your Company's Dollars								·
11. Number of Records Given Free to Radio Stations (000's)			,				٠	
13. Estimate of Your Company's Total Sales of Records and Japes As % of Industry's Total Factory Sales in Dollars.	,		•				ø	
Note: Please round items 4 through 11 to nearest thousand	sst thousan	đ.						ŧ

PART 3

RIAA FINANCIAL SURVEY OF RECORD COMPANIES - 1974 UPDATE

Send form to: Ms. Millicent Hauser J.K. Lasser & Co. (CPA's) 666 Fifth Avenue New York, N.Y. 10019	Questions may be Mrs. Carol C Cambridge Ro Telephone: (6 Cambridge, 1	lerf esearch Institute 17)-492-3800	Company Code Number
Part A: Income Statement		1974	•
,		(in \$1,000's)	
1. Gross Sales			
2. Less: Returns		•	
3. Less: Exchanges, Allowar Discounts, Bad Debts & Taxes			
4. Net Sales			
5. Less: Cost of Goods Sold			
a. A & R & Studio Costs	3		
b. Talent or Recording	Session Costs ·	•	•
 Artist Royalties (inc unrecouped advances payments to artists) 			
d. Payments to AFTRA and MPTF	, AF of M,	•	
e. Mechanical Fees	•		
f. All Other Production turing Costs	& Manufac-		
g. Total Cost of Goods	Sola ´	•	
6. Gross Margin (#4 minus #5	5)		
7. Less: Selling, Promotion, tion & General Expenses	•		
8. Plus: Other Income minus	Other Expenses		
9. Net Profits Before Income	Tax	v * * ,	
10. Income Tax	•		
1. Net Profit After Income Ta	x ·	,	
2. Total Assets	•	* *	
3. Net Worth	•		•

Part B:	Wholesale Prices,	Titles Released,	Units Sold.	Number of	Employees

					11,000
1.	Average Price to Wholesaler		Dec. 173	Dec. '74	<u> </u>
•	45's				-
•	LP's			•	
•	• \$4.98 list				_
	• \$5.98 list				_
	• \$6.98 list				_
	• \$7.98 list			`	_
	 Average for LP's at <u>all</u> list prices 				_
•	Tapes (cartridge or cassette)				-
			<u> </u>		-
2.	Number of Titles Released/Units Sold	Titles	1973	Titles	1974
	Released/Units Sold	Released	Units Sold	Released	Units Sold
•	45¹s				
•	LP's				
	• \$4.98 list		•	*	•
	• \$5.98 list		•		
	• \$6.98 list		•		Ì
	• \$7.98 list		•		
	• Total for LP's at all list prices	·			
•	Tapes (cartridge or cassette)		,		
	TOTAL				•
3.	Number of employees in your record company		Dec. 31, 173	Dec.	31, '74
	Manufacturing			·	
	Non-manufacturing				
	TOTAL		*		
4.	Number of independent produce	rs whose re	cords you dis	tribute:	

PART IV

CONSOLIDATED INCOME STATEMENT OF RECORDING COMPANIES SURVEYED BY CRI IN 1965 (Millions of Dolleys)	NCOMP. STATEME	Dat OF RECORDING COMPY (Millions of Dollars)	DING COMPANY Dollars)	ES SURVEYED	BY CRI IN 19	, ,		
	1955	1957	1959	1960	1961	1962	1963	1964
Net Sales of Recordings	\$74.9	\$123.5	\$165.3	\$177.3	\$189.3	\$212.1	\$202.6	\$227.4
Less: Artist & Recording Expenses	•		•					
- Contributions to funds	9.1	3.0	e,	7.0	7.7	.4.	4.6	6. 4
- Attack toyattics - Talent & recording expenses	7.6	10.3	14.9	14.5	15.3	17.5	17.1	21.3
Total Artist and Recording Expenses	\$14:7	\$ 22.6	\$ 33.3	\$ 33.8	\$ 37.9	\$ 43.1	\$ 41.6	\$ 47.4
Less: Production & Manufacturing	32.3	49.5	71.3	76.2	79.6	90.2	86.2	.95.5
. Gross Margin Before Mechanical Fees	\$27.9	\$ 51.4	\$ 60.7	\$ 67.3	\$ 71.8	\$ 78.8	\$ 74.8	\$ 84.5
Less: Selling, Promotion, Administrative 4. General Expenses	17.6	26.1	37.2	41.3	44.7	49.2	80.9	54.6
Loss: Mechanical Royalties	9.9	11.3	16.3	17.4	18.8	18.8	, 22.2	25.2
Net Profits on Sales Before Taxes & Before Foreign Fee Income and Other Miscellaneous Income	\$ 4.3	\$ 14.0	\$ 7.2	9.6	8.8	\$ 10.8	. 4 1.7	. .
Plus: Other Income (including foreign fee Sucome) ** 1.4	Bo)** 1.4	3.2	3.9	4.1	5.9	4.8	6.6	5.4
het Profit Before Income Taxes	\$ 5.6	\$ 17.2	\$ 11.1	\$.12.7	\$ 14.2	\$ 15.6	\$ 8.3	\$ 10.1
Income Taxes ***	2.9	8.8	9.4	9.9	7.1	5.3	4.9	6.1
Net Profit After Income Taxes	27.7	3	7	6.1	7.7	\$ 10.3	2.5	÷
Number of Reporting Companies	٠	o	11	19	19	61	19	20
Estimated % of Industry Sales Represented ***	44.81	49.98	\$6.21	\$7.84	\$4.04	56.38	. \$9.08	\$0.09

Includes depreciation.

"Other income" is not included in net sales.

... Income taxes include state as well as federal taxes.

**** The estimate of the % of industry sales represented by the nurveyed companies was based on excise taxes paid by these companies in 1955-1965.
The 1964 percentage was calculated by the method used for 1967-1973 in Part 1 of Appendix A.

Mote: Totals do not always add pracisely because of rounding. The figures here are only for the U.S. operations of the record companies curveyed. Pigures for their foreign subsidiaries are not included.

Source: CRI's 1965 survey of leading record companies. For results in more detail see Exhibit 5. The statistics here are the sum of the figures reported by the surveyed companies and do not include any estimates for the multitude of companies not in the survey.

PART IV

CONSOLIDATED INCOME STATEMENT OF RECOR, INC COMPANIES SURVEYED BY CRI in 1972, 1973, and 1974

		(Millions o	(Millions of Dollars)					
	1961	1968	1969	1970	161	1972	1973	1974
Net Sales of Recordings	\$256.4	\$290.1	\$410.1	\$521.2	\$548.8	\$583.5	\$572.7	\$702.0
tess: Aftist & McCotding Expenses	•		;	,				
- Artists' royaltles	 	39.5	59.8	97.0	9.6 102.4	109.7	9.7	13.8
- Talent & recording expenses	17.2	18.0	25.8	29.5	33.0	35.1	43.6	34.7
Total Artist and Recording Expenses'	\$ 58.2	\$ 62.8	\$ 90.7	\$119.9	\$145.0	\$152.8	\$164.7	\$183.2
Less: Production & Manufacturing	89.3	98.2	135.2	. 175.5	184.4	188.5	190.5	223.5
Gross Margin Before Mechanical Pee Payments	\$108.9	\$129.0	\$184.2	\$225.9	\$219.4	\$242.1	\$217.6	\$244.6
Less: Selling, Promotion, Administrative & Goneral Expenses*	75.8	87.0	111.7	140.9	147.7	5 691		
Less: Mechanical Royalties	23.2	25.2	33.1	42.6	47.9	47.4	3 5	6717
Not Profits on Sales Before Taxes & Before		İ						2
Foreign Fee Income and Other Miscellaneous Income	\$ 9.8	\$ 15.7	\$ 39.3	\$ 42.3	\$ 23.8	\$ 32.1	4 9.4	\$ 31,8
Plus: Other Income (including foreign fee income) ** 10.8	10.8	14.1	20.1	28.8	30.7	36.9	35.5	45.7
Not Profit Before Income Taxes	\$ 20.7	\$ 30.8	\$ 59.4	\$ 71.1	\$ 54.6	\$ 69.0	\$ 44.9	77.4
Income Taxes***	10.0	15.8	31.2	36.3	27.2	34.8	25.2	42.0
Net Profit After Income Taxes	\$ 10.7	15.0	\$ 28.3	\$ 34.9	\$ 27.4	3.4.6	\$ 19.7	6 35.4
Number of Reporting Companies	,	•	9	22	11	21	13	ų
Estimated & of Industry Sales Represented ***	44.06	43.04	52.0	63.04	62.01	60.7	\$6.8\$	χ.Α.

Includes depreciation.

"Other income" is not included in net sales.

*** Income taxes include state as well as federal taxes.

Note: Totals do not always add pracisely because of rounding. The figures here are only for the U.S. operations of the record companies surveyed. Figures for their foreign subsidiaries are not included.

Source: CRI's 1973, 1974, and 1975 surveys of leading record companies. For results in more detail see Exhibit 2. The statistics here are the sum of the actual figures reported by the companies surveyed and do not include any estimates for the multitude of companies not in the survey.

Exhibit 6 -- STATUTORY LICENSE ROYALTIES PER TOP 150 LP ALBUMS -IN 1973 AT VARIOUS STATUTORY RATES

This exhibit, together with the discussion on pages 56 and 57 is fairly self-explanatory. Nevertheless, it is important that the derivation of the 59% figure be completely understood.

The calculation i 'ased on a sample of the top 150 of the "Top 200" LP albums from <u>Billbo</u>; _, March 3, 1973; these albums accounted for 165 LP records (because some albums contained two records) and 1,653 tunes. The number of tunes per record was counted, and playing times were measured, tune by tune. This, clearly is <u>not</u> a sample of <u>all</u> recordings. Tapes and singles were excluded. There would be some releases on singles which did not appear on LP's, but there would be virtually no tape releases which did did not come out on LP's or singles. Probably, the top 150 would be representative of the majority of U.S. sales, but they are not statistically representative of total U.S. releases or sales.

For purposes of calculation, it was assumed that each of the tunes in the top 150 was at the 2¢ statutory mechanical royalty rate. In fact, some may have been at a higher rate, some at a lower rate; and there could have been included some public domain tunes at 0¢. Most likely, there was little or no public domain material included; it does not "sell."

In addition, the current general (but not universal) practice of paying an additional royalty of 1/2¢ per minute of playing time over five minutes was included in the calculation of 22¢ as the average mechanical royalty per record under the present law and present practice. That would take c e of the tunes that were over 2¢.

There was then calculated what the mechanical royalty would be under H.R. 2223, tune by tune, applying the proposed statutory provisions to the data on tunes per record and on playing times. The result of this calculation was an average mechanical royalty of 35¢ per record.

The increase from 22¢ to 35¢ is 59%, as reported. Whether or not any of the tunes in the sample actually were licensed at less than 2¢, as some

probably were, is immaterial to the calculation of the 59%. The calculation can be looked upon as expressing the <u>statutory</u> rate change (taking account of the current playing time practice); or it can be regarded as a measure of the change <u>if</u>, whatever the actual rate, all licenses moved up by 50% (and the playing time provision in H.R. 2223 were taken account of).

If we had not taken account of the current practice of paying 1/2¢ per minute over five minutes, the percentage increase shown would be greater than 59%. As it is, since as we understand this playing time practice is not universal, probably we are slightly understating the percentage increase of 59%.

As to the fact that singles were excluded from the sample, two points are in order. First, their exclusion tends, if anything, to <u>understate</u> what the calculated percentage increase (59%) would be were they to be included in the sample. This is so because there is only one tune per side on a ingle; on an LP, a longer band (incurring the playing time provision of H.R. 2223) subtracts from the playing time available for other bands on the same side. Second, LP's - taken by themselves - constitute a large and significant portion of total unit sales of recordings. We do not know precisely what portion, but we do know that LP's accounted for about 2% of dollar sales in 1974.

Were tapes to have been included in the sample, the results probably would have been little different. Tunes released are essentially the same as those on records (LP's in the main, we understand). And, far fewer licenses on tape are at less than 2¢, we are told; the mechanical royalty rate, tune by tune, otherwise is very similar to, or exactly the same as, the rate for LP's.

Note that 1973 data were employed. The results could be somewhat different if 1974 data were examined.

Exhibit 7 -- FINANCIAL IMPACTS OF PROPOSED INCREASED MECHANICAL ROYALTIES ON MUSIC PUBLISHING INDUSTRY AND RECORDING INDUSTRY, 1971-1974

This exhibit applies the 59% figure developed in Exhibit 6 to total mechanical royalties paid during the four-year period, 1971-1974. Totals

arrived at in the exhibit are self-explanatory and are discussed in the text. The emphasis in this exhibit is on the effect of a 59% increase in mechanical royalty payments on U.S. recording company pre-tax profits from all sources.

Exhibit 8 -- MECHANICAL ROYALTIES COMPARED TO RECORDING INDUSTRY PRE-TAX PROFITS FROM RECORDS MADE AND SOLD IN THE UNITED STATES, 1971-1974

This exhibit shows in similar fashion the effect of the proposed 3¢ rate on pre-tax domestic recording industry profits (line 11, Exhibit S-C, p. 49). Mechanical royalties are paid on the basis of recordings made and sold in the U.S. As the exhibit illustrates, the potential impact of a higher rate on domestic profits is disastrous.

Exhibit 9 -- IMPACT OF A COPYRIGHT ROYALTY INCREASE ON CONSUMER PRICE

This exhibit is self-explanatory. However, it is important to recognize that the pices and dollar margins presented are only illustrations, based on a \$6.98 list price record. The average price paid by consumers on all records is much less than the average \$5.77 they pay for a \$6.98 record.

The exhibit also shows the more moderate impact on the consumer price a mechanical rate increase of 1/2¢ would have, as compared to the proposed 1¢ increase.

It must be recognized that a cost increase at the producer level cannot be passed along without increases along the way. The increase in cost to middlemen that would result from an increase in the mechanical royalty being passed on by recording companies would lead to still further increases by middlemen in order that they be able to maintain their margins. Such further increases would be justified by the additional costs they would incur, such as for insurance, inventories, financing, bad debts, and the like.

Exhibit 10 -- COST TO CONSUMERS OF A 3¢ STATUTORY LICENSE RATE

This exhibit, with footnotes, is self-explanatory. (RIAA estimates of retail sales of recordings, at <u>list</u> prices, are made annually.)

Exhibit 11 -- IMPACT OF A COPYRIGHT FEE INCREASE ON JUKEBOX OWNERS

Statistics for this exhibit are derived from the principal financial survey, as explained in the footnotes to the exhibit.

Exhibit 12 -- TUNES AND PLAYING TIME OF TOP 150 LP ALBUM RECORDS

The exhibit, with footnotes, is self-explanatory.

Exhibit 13 -- RECORD MAKERS UNIT SALES PLR RELEASE AND BREAKEVEN POINTS (1972)

Date in this exhibit are based on an analysis of results that were an integral part of the 1973 financial survey. (See Technical Appendix, on Exhibit 5). The distribution of sales by volume is from Form # (5) of the questionnaire. The breakeven information is from Form # (4), and is summarized on the following page:

BREAKEVEN ANALYSIS 1972

· (Figures are in \$ except for item 5, which is in units)

		45'8	Popular LP's	Classical LP's	Popular Tapes	Classical Tapes
-i	1. Net Factory Selling Price per Record	\$0.484	\$2.740	\$2.934	\$3.518	\$3.686
٠ <u>٠</u>	Less Total Variable Costs per Record - Artists Royalties Find Demonts	\$0.328 0.085	\$1.609 0.449 0.056	\$1.637 0.486 0.048	\$1.713 0.410 0.073	\$1,856 0,427 0,065
	Fund Fayments - Copyright License Fees - Variable Manufacturing and Shipping Costs	0.037	0.225	0.083	0,233	0, 110
	- Variable A&R, Studio Recording, and Talent Costs - Variable Selling, Promotion, and General Costs	0,005	0.038 0.257	0.047	* 0.135	* 0.150
,m°	. Contribution to Fixed Overhead and Profit (1 minus 2)	\$0.158	\$1.130	\$1.297	\$1.805	\$1.830
4.	Averrge Investment in Fixed Overhead per Release - Fixed A&R, Studio, Recording, and Talent Costs - Unrecouped Artist Royalties and Bonus Payment - Fixed Manufacturing and Shipping Costs - Fixed Selling, Promotion, and General Costs.	\$7,212 1,591 1,503 430 3,635	\$68, 497 15, 348 16, 053 4, 143 32, 604	4,528,714 11,819 1,143 1,143 1,147 14,231	\$44,199 10,195 6,002 1,150 26,473	\$62,900 24,700 -3,000 41,200
5.	Required Number of Records which have to be Sold per Release to Break Even in Terms of Average Investment in Fixed Overhead per Release (4+3)	45, 678	60, 584	. 22,131	24, 092	34, 371
Z	Muraber of Corapanies Reporting	80	7	ŵ	ĸ	
141	Estima: 16. (of Industry Sales Represented	51%	45%	34%	. 33%.	8%.
*	*These are charged to the records which are manufactured before the tapes. a record. N. he music has been successful.	ctured befo	re the tape:	s. Tapes are	Tapes are produced only when	only when

he No explanation was given by the reporting company of why a negative number was given for "fixed manufacturing and recording costs" for classical tapes or no figure, was given for "fixed depreciation costs" for such tapes.

Source: CRI's 1973 survey of recording companies.

Exhibit 14 -- RECORD RETURNS, 1969-1974

The industry has long had a practice of allowing free returns of unsold merchandise to manufacturers. This exhibit summarized the dollar magnitude of this activity.

Exhibit 15 -- CONCENTRATION IN THE PHONOGRAPH RECORD INDUSTRY 1947-1970

The exhibit shows clearly that the trend toward reduced concentration which began at the end of World War II has continued since the 1965 hearings. Concentration in the recording industry is declining.

Exhibits 16-21 -- DISTRIBUTION OF ROYALTY RATES

PAID ON COPYRIGHTS BY TYPE OF
RECORD ON RECORDS RELEASED BY
THO COMPANIES IN 1974 PERIODS

The final six exhibits provide specific, new information on what has come to be known as the "ceiling vs. rate" issue.

To obtain the data contained in these exhibits, CRI undertook a comprehensive study of all licenses issued in 1974 by two companies and for which data were available at the time of the study. The nature of the study is spelled out in detail in pp. 82-118 of the main report.

As an aid to understanding this section of the report, the following guide to the exhibits might prove useful:

Basically, the exhibits fall into two main groups -- (1) tabular listings of the mechanical rates paid, record by record; and, (2) statistical distributions of the rates. These groupings are further subdivided by type of record -- i.e., whether the record was a single, a regular price LP, a budget-label release, or a "club" record.

Looking at the total of tunes studies, the frequency distribution of rates by price, type of record, and reason for discount is summarized in Exhibit 21 on page 118. Similar information, excluding club records which are paid at a very standardized variation from the 2¢ rate, is summarized in Exhibit 16 on page 90. Exhibits 17, 18-A, 19, and 20 on pages 99-113, and 115-116 tabulate the rates record by record and are discussed in detail in the text.

Exhibit 18-B on page 94 demonstrates explicitly the standard variations from the 2¢ rate which were found in the sample. As discussed in the text, these discounts from the statutory rate were found to be for standard, recognizable reasons which are regular everyday practice in the industry.

A study of licensing needs to be based upon a sample of licenses. Studies based on samples of records sold are interesting but they are not directly relevant to an examination of the licensing process. For example: in a study of licensing 100 licenses are examined; 98 are at 2¢, and 2 are at 1.5¢. The picture of licensing rates derived is quite different than if the sample were to be weighted by the fact that one of the 1.5¢ licensed recordings was a particularly outstanding seller.

In any event, licensing routinely occurs before anyone knows what the volume of sales will be for a particular licensed recording; consequently, the opportunity for sales volume (which comes after) to affect the pricing of a license transaction (which comes before) is highly limited.

The percentage distribution of various rate categories reported from the CRI study of licenses has not been distorted by weighting for sales volume. To provide a comprehensive picture, all licenses signed by two leading firms during most of 1974 were included in the study.

We estimate that the two cooperating recording companies sold over 50 million records in 1974, more than one-sixth of total industry volume. On this basis, we believe the experiences exhibited in the sample data are reasonably and substantially typical of industry practice.

Dr. Glover. If we may turn to exhibit A, this summarizes the first part of our presentation. We will show that, in fact, copyright owners' income has outpaced inflation by a very substantial margin, and we shall show that an increased statutory rate would hurt consumers, recording artists, musicians, and recordmakers without any just cause. We shall show that their income has increased faster than the consumer price index and another very common measure of economic welfare, which is median family income.

A number of effects would take place under an increased statutory rate. One would be the pressure to increase prices. If the total effect of this increase in royalty took itself out in the form of increased prices, it would raise the ultimate cost of the 2-cent increase as proposed in the section to over \$100 million. As Mr. Gortikov said, if it

went to 4 cents, it would be roughly doubled.

The profits of recordmakers would be under great, not minor, pressures. In fact, the proposed increase is equal to about the profits which are made by the record companies on the manufacture and sale of records in the United States.

Recordmaking is a very risky business, as I am sure you are all aware. We hear a great deal about the hits. We do not hear a great deal about the failures. In fact, as I shall show, a large fraction of the records do not even cover their costs, let alone make any profits. Accordingly, this would raise the break-even point and increase the chance of risk, with a depressing effect on the offerings of new, experimental, and high-risk music.

In consequence, the employment in the industry would fall for artists, musicians, sound technicians, studio personnel, manufacturing personnel, and would have a grave impact, as I said, on the entire industry; and indeed, even on new and unknown omposers whose

works would present a particularly higher risk.

If we may turn to exhibit B, when the statutory rate was set in 1909, as Mr. Gortikov said, the manufacturer's price was about 40 cents for that reel that he showed you. At that point, the 2 cents represented exactly 5 percent of the record price. The record company receives about 27 cents per tune now, and out of that, the copyright owner still receives his 2 cents. And that represents, now, 7½ percent.

So, in terms of shares over the years, Congress felt that 5 percent was not a bad share in 1909. And now, copyright owners are, in fact,

getting a larger share of those proceeds than they did then.

If we can turn to look at the total in exhibit C, just in recent years, these are the estimated mechanical royalties that have been paid. They have gone up from \$38 million to \$79 million. In fact, a better figure than the \$79 million is probably somewhere in the neighborhod of \$83 million, and if you round it off to \$80 million, you can see that,

in fact, the royalties in those years have more than doubled.

In considering the income received by copyright owners, I think it is entirely appropriate to take into account not only the mechanical royalties that they get directly from the phonograph records, but the performance royalties that ey get, especially from radio broadcasts, which are also very substantial, and from which, of course, the record companies derive no income whatever under the present copyright law. They get performance fees, I might also say, in background music, which is a growth industry.

We will now turn to the direct comparison of publisher incomes with price indexes. As you can see, the consumer price index has gone up by 45 percent in roughly that 10- or 11-year period. The median family income has gone up about 93 percent. The proceeds to copyright owners from mechanical royalties alone have substantially more than doubled—and this, I would like to emphasize again, excludes their income from performance royalties from phonograph records, whether it be on radio, television, or whatever.

Another way of looking at this, if we can have the next exhibit, is to see—this is on the basis of per tune. Lest it be argued that the increase does not take into account that there are more composers or such, this

exhibit shows what has happened per released tune.

There are 50,000 released tunes per year, roughly. For every single band on that record that Mr. Gortikov showed you, there was a separate released tune. If this record is put onto a tape, there is another series of 10 or 12 released tunes If it is put on quadraphonic sound, there are more released tunes and so on. There are roughly 50,000 released tunes a year.

The income per released tune has gone up from \$656 per released tune in 1963 to almost \$1,400 in 1972. We were not able to get a later year to give you those figures, but again, you can see that it has gone

up even faster; that it has gone up by over 200 percent.

Mr. Wiggins. Excuse me. So that I can understand the chart, is a record album a single release, or is it a series of 10 releases?

Dr. Glover. Ten or twelve, depending on how many there are on there. Each band is a separate released tune and for each form of

recording, again, it often requires a separate release.

Mr. Danielson. I have a supplemental followup question there. You have a better than doubling there on the mechanical royalty. Is it proper to infer that each tune is released more times, or are there more tunes being released?

Dr. Glover. You mean over time?

Mr. Danielson. Yes; you have that red column, there.

Dr. GLOVER. There are more releases per tune.

Mr. Dantelson. In line with Mr. Gortikov's showing of that, some tune got 91, for example?

Dr. Glover. Yes. There are more releases per tune.

Mr. Danielson. As you have more tunes per mechanical device, per record or tape, the same tunes get used, become fixed more times.

Is that the idea?

Dr. GLOVER. Yes, sir. You have more artists and more forms of recording. And then there are followups. Again, as you are well aware if you are a record fancier, or if you watch television, you will see that there are reissues. Nat King Cole's records and so on which is sort of like a paperback. And again, those also—each one of those represents an additional release.

Mr. Danielson. I think what you are trying to tell us is that a given work, a given composition, is released more times at the present. Its probability of being released is greater at the present than it was years

ago.

Dr. GLOVER. That is right.

Which is not to say that everyone who has a tune will succeed in getting it recorded or that it will then be sold. In fact, many records, as I shall point out in a moment, do not sell very well. In fact, they sell very badly.

Mr. DANIELSON. But if you have a tune that is an absolute flat out failure, but it is coupled with this Phoenix tune that Mr. Gortikov

shows, he is still going to get the 2 cents.

Dr. GLOVER. He gets it just as much as the lead tune on the album, and it may be a band that you hope you will get through quickly so you can go on. But he gets 2 cents also.

This we believe is really a proper unit of measure because this

approximates what you get for a license or for a released tune.

So, to summarize the inflation argument, the fact of the matter is that on a percentage basis, it is more than they got originally. It is not as much as they got some time ago. But that depends. These things come and go and good years and bad years come and go, just as record profits go up and down, as I shall go on to say in a few moments. The total dollar amount, of course, has increased enormously since the copyright law was established and has increased enormously in these last several years. So that the aggregate income going to copyright contents many of them, obviously, are not composers—has increased very substantially. And in fact it has gone up a lot faster.

Now, we take a look at the impacts here. If the royalty rate goes up, as is proposed in pending legislation, this would be about a 59-percent increase. This would push up the total aggregate payments by \$47 or \$50 million. That is the size of the increase. Now obviously that size of an increase would have some kind of an impact. One impact, of

course, is to push down your own profits.

Profits of the industry are not large enough to conform to that, as we will show in just a moment. So, if they were fully absorbed, this would essentially cut out about two-fifths of the industry's profits, and almost 100 percent of the industry's profits from records made and sold in the United States. The rest is the income from foreign record companies, using American made masters.

If this total increase is passed along in the form of a price increase, this will, as I have indicated by the margins downstream to distributors, wholesalers, rackiobbers, retailers and the like, represent an increase of about 100 million. In fact, that is such a substantial amount, it is not easy to do, and no doubt, the industry would look for other alternatives:

They would, first of all, not like to to cut into existing pross. They would like not to pass it on fully, to consumers. So, they would in fact be looking for other possibilities.

I might just point out, before we go on what some of these other alternatives are.

One alternative of course, is to decrease the amounts of music on a record. And, this has indeed happened as a response to trying to keep the prices down. An opposite course is to play longer pieces of music if that is compatible with the esthetics. And there are other minor forms of economy.

I would like to take a look at the matter of the breakeven point. When I was here before, we showed you at that time that on popular LP's they took about 7.800 copies before you got your breakeven point. That figure is now up to 61,000; 61,000 copies before you got your original investment back. In 1963, in fact, 61 percent of the records

released did not, in fact, even get their cost back, let alone make any money. And that figure has now risen to 77 percent. So, you have a 77 percent chance of not getting your money back, let alone making any money. And, in fact, what happens, of course, in this industry as in other industries, it is those few records that are successful that carry the lot. When it comes to classical music—this is the real economic disaster area.

In 1963, there were 9,700 copies that broke even. This is now up to 22,000. In 1963, 87 percent of the records did not cover their costs. And this is now up to 95 percent. So, 95 percent of all the classical music offered to the American public is offered at a substantial loss. And in the aggregate it is run at a loss. This is a loss area. And it

makes no contribution to the industry's profits.

Now, I would like to emphasize the point that raising the statutory rate by 2 cents—and it sounds very small—this of course is a substantial increase in the price of the record, and the cost of the record. What it means is that it reduces your chances of making any money. And consequently, what you will do, the major response is to cut out your risky or your more innovative kinds of music, whether it is innovative on behalf of the composer, or the arranger, or the artist, or the russician, or the offering by the record company itself.

Mr. Danielson. I wish to advise you, Mr. Glover, that you have consumed 15 minutes. We cheated on you and took a couple of min-

utes. So, that is sort of a warning.

Dr. Glover. Thank you. There was one last point, which the publishing interests makes a great deal of. It is very complicated and very technical. They argue that increasing this rate merely increases a ceiling under which bargaining can take place. We have indicated 10 years ago and we have indicated again that there is no such thing as bargaining. There are 50,000 releases, there are hundreds of record companies, there are scores of publishing companies. The industry does not, in fact, sit down and haggle and bargain on a case-by-case basis as in the bazaar in Damascus. This isn't highly individualized—99 percent of these records come through at standard rates or standard variations which are club variations, overtime variations, artist discounts, quantity discounts, and the like.

It is perfectly clear that this is so and in fact there are some licenses now being written which simply say that if the statutory rate is increased the fee paid will go up accordingly. And it cannot be otherwise. Otherwise, all kinds of problems of price discrimination would occura company charging more or less to smaller or larger record companies and record companies paying in smaller or larger amounts. In fact, we work in a nondiscriminatory, uniform way for very good, sound eco-

nomic reasons. And it will under any future rates.

This next chart simply shows that in 1963, 99.4 percent of the licenses were paid at the standard rate or standard variations uniformly available to all companies. This figure in 1974 is 99.2 percent. So, the fact is that it is a rate, it has been a rate and it will always be a rate, for some period, for sound reasons. So, in summary, publishers' income has in fact outpaced inflation very substantially. And a higher rate would hurt consumers, it would hurt recording artists and musicians, and it would have a disastrous effect on the profits of the record industry.

Thank you.

Mr. Danielson. Thank you, Mr. Glover.

We will now move on to Mr. Michael Kapp, president of Warner Special Products, Inc.

TESTIMONY OF MICHAEL KAPP, PRESIDENT, WARNER SPECIAL PRODUCTS, INC.

Mr. KAPP. Good morning, my name is Michael Kapp. I am president

of Warner Special Products, Inc.

During much of my 20 years in the recording industry, I have been directly responsible for all details of music licensing and mechanical

royalty rates.

I am an executive with one of the largest groups of recording companies in the industry today—Warner Bros. and Reprise Records, Atlantic and Atco Records, and Elektra and Asylum Records; all Warner Communications companies.

I have read and heard claims of the music publishers that:

1. Mechanical royalty rates are "negotiated" between publishers and record companies and the current 2-cent statutory rate is merely a "ceiling" for negotiation.

2. Therefore, an increase in the statutory rate to 3 cents would have only a modest effect on the industry, since the change would merely

create "more room for bargaining."

I am incensed at how misleading these claims are and will try to

show that since No. 1 is inaccurate, No. 2 is therefore false.

Our companies annually secure approximately 4,000 mechanical licenses for regular priced recordings. Of those, a close estimate is that 86 percent were granted at or even above the statutory rate. Of the remainder, over 13 percent are licensed on a per album basis, because the recording artist is also the composer and publisher. Within his artist contract, he and the recording company have agreed to a fixed number of cents per album, such as 20 cents, 22 cents, 24 cents, regardless of the number of songs used. Therefore, the actual rate per song—slightly above or below 2 cents—depends entirely on the total number of songs on that record.

From this you can see, virtually all of our regularly priced records today—specifically, 99.1 percent—are licensed at or very near the

statutory rate.

It is true that licenses are issued at a royalty rate below 2 cents; however, these records fall routinely into regular categories universally accepted in the trade. Standardized rates below the 2-cent level are granted on recordings that are usually lower priced, such as: budget records, records sold via television, records sold through record clubs, records sold as premiums. All of us in the business know that license rates for these records will be below 2 cents, just as all of us know that rates for regular priced recordings will be essentially the statutory rate.

If the statutory rate goes up to 3 cents, then regular priced records will pay 3 cents; and standardized rates off the 3 cents will be for those lower priced records. Business will go on just as before, only at the higher rates. There will not be much bargaining over rates because

there is not much now.

Thank-you.

Mr. Danielson. Thank you, Mr. Kapp.

And the anchorman, the concluding witness on this side of the debate will be Mr. John Cohen, member of the board of directors of the National Association or Recording Merchandisers.

Could you proceed, Mr. Cohen?

[The prepared statement of John Cohen follows:]

STATEMENT OF JOHN COHEN, PRESIDENT, DISC RECORDS CO., AND MEMBER, BOARD OF DIBECTORS, NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, INC.

My name is John Cohen. I am president of Disc Records Company which operates forty retail record stores in fourteen States. In addition, I am a member of the Board of Directors of the National Association of Recording Merchandisers, whose regular membership consists of hundreds of retailers and dis-

tributors of sound recordings throughout the United States.

Our segment of the recording industry has grave concern about any increase in the "mechanical royalty" rate. If the rate goes from 2 cents to 3 cents, as proposed, we are faced with the possibility that the recording companies will be unable to absorb the increase and that, therefore, the increase will be passed on through the chain of distribution. Speaking for our organization as typical retailers, in such an eventuality, I can assure you that we would be unable to absorb the increased wholesale price which would result. Our company operates on a gross margin of 40% and a net profit of only 3% after taxes. We would, therefore, be compelled to pass on the increased cost to the consumer.

So far in 1975, no doubt due to the depressed economy, the number of sound recordings sold by our stores has decreased as has the total dollar volume of our sales. I am confident that an increase of 30-35 cents per average LP recording, which would appear to be the added burden to the consumer if the royalty rate is increased to 3 cents and if passed on, would further decrease the number of recordings that we sell. Not only would that affect our business, but it would mean that the availability of sound recordings to the consuming public would decrease. Interestingly enough, this is not a matter which affects only the young people as 60% of the sound recordings that we sell are purchased by adults.

You have already heard extensive testimony with regard to the absence of the need for an increase in mechanical royalty payments. In our view, that case is persuasive and the additional cost which may thereby be imposed on purchasers of sound recordings would not be warranted. I need, not remind this Subcommittee of the heavy burden being borne by the consumer in these inflationary times. Any increase in that burden should be imposed only where a clear and absolute need is shown. Judging from the information we have, an increased burden based on additional mechanical royalty payments is unjustified.

Thank you for the opportunity to present this testimony.

TESTIMONY OF JOHN COHEN, MEMBER OF THE BOARD OF DIRECTORS, NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, INC.; PRESIDENT, DISC RECORDS CO., ACCOMPANIED BY CHARLES RUTTENBERG, COUNSEL

Mr. Cohen. My name is John Cohen. I am president of Disc Records Co. Accompanying me is Charles Ruttenberg, counsel for our

association.

I operate 40 retail record stores across the country in 14 States. In addition, I am a member of the board of directors of the National Association of Recording Merchandisers, whose regular membership consists of hundreds of retailers and distributors of sound recordings throughout the United States.

Our segment of the recording industry has grave concern about any increase in the mechanical royalty rate. If the rate goes from 2 cents to 3 cents, as proposed, we are faced with the possibility that

the recording companies will be unable to absorb the increase and that, therefore, the increase will be passed on through the chain of distribution. Speaking for our organization as typical retailers, in such an eventuality, I can assure you that we would be unable to absorb the increased wholesale price which would result.

Our company operates on a gross margin of 40 percent and a net profit of ordy 3 percent after taxes. We would, therefore, be com-

pelled to pass on the increased cost to the consumer.

So far in 1975, no doubt due to the depressed economy, the number of sound recordings sold by our stores has decreased as has the total dollar volume of our sales. I am confident that an increase of 30 to 35 cents per average LP recording, which would appear to be an added burden to the consumer if the royalty rate is increased to 3 cents and is passed on, would further decrease the number of recordings that we sell.

We also are afraid of being priced out of the youth market. Not only would that affect our business, but it would mean that the availability of sound recordings to the consuming public would decrease. Interestingly enough, this is not a matter which affects only the young people as 60 percent of the sound recordings that we sell

are purchased by adults.

You have already heard extensive testimony with regard to the absence of the need for an increase in mechanical royalty payments. In our view, that case is persuasive and the additional cost which may be imposed on purchasers of sound recordings as a result of an increase in the royalty rate would not be warranted. I need not remind this subcommittee of the heavy burden already being borne by the consumer in these inflationary times.

Any increase in that burden should be imposed only where a clear and absolute need is shown. Judging from the information we have, an increased burden based on additional mechanical royalty pay-

ments is unjustified.

Thank you for the opportunity to present this testimony.

Mr. Danielson. Thank-you, Mr. Cohen. That concludes the four witnesses who have been scheduled to testify concerning the opposition to the increase.

We will now open the hearings for questions to these four witnesses.

Father Drinan, would you like to lead off?

Mr. Drivan. Thank you very much. I thank you gentlemen for

your appearance.

I wonder if we should discuss first whether we should go back to point zero and wipe out completely the statutory 2 cents that was set in 1909. As I read the history, it was set in order to prevent one piano roll company from obtaining a monopoly over others. And it certainly is anomalous, I do not have to tell you people, to have a 1975 regulated industry of this nature.

In the testimony that is to follow on the other side they suggest that political realities indicate that we simply have to keep the regulation in some way. If you people had your choice, would you deregulate the industry in this regard completely?

Mr. Gorrikov. No, sir. I would maintain the license and a concomitant of that is a fixed royalty rate at whatever royalty rate is set.

Originally, there was a publisher monopoly as well as a piano roll company monopoly. I think that if the compulsory license were lifted, in other words, if it were completely deregulated, you open the way for putting too much clout in the hands of publishers—or in the hands of record companies.

I think that the system has worked well. I think that the main argument, the defense of what is, is that it is working very well. The parties are doing well. I think that there is no reason to change them. And I think that this is the greatest argument for maintaining the compul-

sory license system: It is doing well.

Mr. Drinan. Do I understand that in Europe and in other countries the recording artists do, in fact, get a percentage of the record price?

Mr. Gortikov. Yes; they do.

Mr. Drinan. Would you elaborate a bit on that?

Mr. Gortikov. In some European countries, a percentile of the price is paid and divided by the composer, and publishers. Just because Europe does it, does not necessarily make it such a grand proposal to

copy for ourselves.

Our system has worked well for us. And unfairness is implicit, I think, in a percentile mode. For example, on this LP here, if the royalties were paid on a percentile basis and if there were 8 publishers and composers on it the same amount of money would accrue to the 8 as would be paid if there were 16 publishers and composers. Some would be getting too much and some too little.

Also, if, back to the compulsory question, if there is a decontrol envisioned, then you might as well decontrol all the way and not have the

life plus 50 protection.

Mr. Drinan. Where is it really different from the book industry? We do not get rid of copyright there and the person who writes a book has his publisher negotiate with the paperback company and his publisher deals with serializations or excerpts from the books without any statutory safeguards.

Mr. Gorrikov. A book is a definitive work. It is an end product. This piece of music is not an end product. This is a piece of music, which has a price tag, incidentally, of \$1.50 on it. It comes alive when a performer does something with it. A book is a definitive work, start to finish, in

itself. It declares itself complete.

The imposition of a performance and the creative effort done by a recording company make a musical work come alive and become of commercial value. It also can result in multiple uses and multiple sources of income. It is altogether different from books.

Books may have a multiple use, such as a motion picture or a paperback. But the multiple uses of this song are almost infinite, whereas, for

a book they are not.

Mr. Drinan. Is there any sentiment, either among the composers or the publishers, for deregulation?

Mr. Gortikov. Certainly not among record companies and I think composers and publishers should speak for themselves.

Mr. DRINAN. I was hoping that we could get the Federal Government

out of something. But we are not getting any votes here at all.

Well, I have listened to your arguments and I will listen to the other side. And I am afraid my 5 minutes are up. So, I yield back whatever time there is. And I thank you gentlemen for appearing.

Mr. Danielson. Mr. Wiggins of California.

Mr. Wiggins. Mr. Chairman, I am not sure my voice is going to hold out for questions, so I will just listen. I think the issues are pretty easily stated, but difficult to resolve.

I yield back my time.

Mr. DANIELSON. Mr. Pattison.

Mr. Parrison. Father Drinan asked all my questions.

I am interested in this notion that you take a loss on certain records, on 87 percent or 77 percent or whatever happens to be. You do not do that intentionally do you?

Dr. GLOVER. No, sir.

Mr. Gortikov. No; the loss is certainly not done intentionally. Every genius in the record industry thinks he has a winner when he records it.

But the consumer comes to a different judgment in most cases.

Mr. Pattison. Well, the notion that follows that is that if you were to be paying a higher price for the mechanical royalty, that this would have an effect on certain kinds of records that you produce. In other words, that you would produce less innovative records, less classical records, less records that maybe do not have as good a chance of succeeding. And I am wondering if in fact you intentionally pick out a record that you think is not going to succeed and produce it because you think that you are doing a young artist a favor or a classical composer a favor, or it is good for the country or something like that. In other words, is that your motivation?

Mr. Gorrikov. The rationale is that if there is a decline in profit or profit potential—and that is our greatest fear out of this—that decline will make that record company less bullish in its recording practices. What we fear even more, if all this cost is passed on to the consumer, is

that there will be a real decline in consumer purchasing.

Now, although a record company approaches every recording session optimistically, it does have degrees of optimism and faith in the various new artists or categories, such as jazz or the classics, where there is a very marginal chance for profit.

So, what I am talking about is an attitudinal result that will be more marginal than ever, if there is a subsequent decline in income

potential.

Mr. Pattison. In other words, you are saying that your selection process of selecting the works that you are going to form will differ in some way?

Mr. Gortikov. Yes.

Mr. Parrison. But, is that not inconsistent with the notion that you really pick out a record, a performance to put on wax or tape that you intend, in each and every one of those you hope, to make a profit or you would not—a judgment is made that this is going to sell more copies and you are going to make something out of it?

Mr. Gortikov. I cannot give a fixed answer. If a record company has

Mr. Gorrikov. I cannot give a fixed answer. If a record company has five potential new artists to record, it is possible that everybody in that company will be wildly enthusiastic about one of them, and there would be no question about their willingness to record that, and the

predictions for success. And they may be right.

Down the scale, for the fifth one on that list, there may be only one producer who has genuine faith in his potential. And that may be the one that is dropped off.

It could be a reduction of opportunity. Also, the record business is like winners' or losers' poker. If companies are experiencing a grand rush of success, then it is more bullish about its recording practices

than if it has a string of losers.

Mr. Pattison. But the notion that you would, for instance, not pick out the new artist or the new work because it is somehow different. Any record company that followed that kind of a philosophy would not have picked up Paul McCartney or John Lennon or a variety of other people.

Mr. Gortikov. A company that I was once president of rejected the Beatles twice before it ultimately chose them. So it is a peculiar

capability of choices in this business.

Mr. Pattison. We have all made bad mistakes.

Let me address a question to Mr. Cohen and then I will quit.

Your figures were that you have a markup, I think, of 40 percent in the 3 percent net profit. That is not a return on investment now, or is it?

Mr. COHEN. No; it is not. Mr. Pattison. Per record?

Mr. Cohen. On our gross sales we have a markup of 40 percent and a

net of 3 percent after taxes.

Mr. Pattison. But that 3 percent figure is not the same 3 percent figure that the railroads are telling us about? I mean you would not stay in the business very long. There would not be anyone opening up record stores if you had a 3 percent return on your investment.

Mr. Conen. Oh, no.

Mr. Pattison. I have no further questions. Mr. Danielson. I have two questions only.

Mr. Wiggins raised a question on a vinyl album that you have there, whether they were multiple composers or one composer, as I recall it. I think that you responded that they were multiple composers.

Could it be, distinguishing between composers and the owners of copyrights, it is my understanding that composers sometimes sell their interest to someone else, assign them or license them or transfer ownership, could it be that all of you might have multiple composers, you might have one copyright owner?

Mr. Gorrikov. That is correct. It is a good practice that many recording artists today are composing their own music, writing their own tunes and also are establishing and owning their own publishing

companies.

Therefore, they make available to themselves income as performers, as composers, and as publishers. They engage in a contractual relationship with a form of publishing company to hardle the administrative processing that they require. These practices vary all over the lot. There is every gradation and every form of this, but the reality is that the publishing companies and the composers, regardless of what these various formats are, have in aggregate been doing handsomely.

Mr. Danielson. I notice a reference to that in, I believe it was your

statement, Mr. Kapp.

The other question, the mix of tunes that you put onto a given album of 10 or 12 tunes, I am sure that that is one of the things over which your management agonizes as to what to put on one album. If you were to put on one or two or three hit tunes, you have probably very nearly assured a good market in that particular album. And you can fill up,

I would assume then, the remaining six, seven, eight, or nine recordings on that particular album with more speculative compositions. The mix of what is sure fire and what is speculation is a judgmental thing within the recording industry, I assume.

But if that is true, I assume, I am going to assume and I would like to be corrected if I am wrong, that for the hit tunes you will have the statutory 2 cents as the royalty because you have a compulsory license where you can use that. On the speculative tunes, is it customary to

negotiate perhaps a lower figure?

Mr. Gortikov. Mr. Kapp can speak to that but I have one response. There was a period, many, many years ago, when a hit was usually made with a single record, that is a 7-inch 45, small record. And the existence of that hit single then generated the willingness of a record company to put out an album including that hit single, and with other tunes that the artist also was called in to record. It is far more common now for an album containing tunes to be put out with no single record and then, for the public, or the radio in its skew of radio airplay, to dictate what tunes in that album emerge as hits. And then a single record will be put out.

But very often the album is put out with a concept in mind by the creators, or the artist, with no knowledge of which particular tune is going to hit the public's fancy, so that there is therefore no premeditation as to which are the major tunes or which are minor tunes on the

record.

Mr. Kapp may have some supplemental comment.

Mr. KAPP. Could you explain what you mean by the word speculative?

Mr. Danielson. An unproven tune, an unknown tune.

Mr. Karr. As a record producer for about 10 or 15 years, I can tell you that every song that comes in is a speculative tune. The judgment is the producer's, together with the artist, as to whether any given tune will make it.

Mr. Danielson. Every new tune that comes in, but if you ik up a proven tune, one that is already established as a hit and put it in an album, that will have some effect in selling that album.

Mr. Kar. Depending on the artist, not automatically.

Mr. Gortikov. Mr. Danielson, I would like to point out though that as the statistics that we have presented here, 99 percent of those tunes on the regular priced records, regardless of whether they are hits or nonhits, are paid at or very near that 2-cent level.

Mr. Danielson. That was my ultimate question.

Thank you very much.

Mr. Wiggins?

Mr. Wiggins. Do you have any profit information on the recording industry?

Mr. Glover. Yes, sir. We have submitted it 10 years ago and we submit it to you now, not only the profit information, but the line items on individual costs.

Mr. Wiggins. Just in fairness, I think we ought to have that. You emphasize, obviously, the position of the composer which is important information. But we need the other half of that equation. I would like to compare how well you have been doing. So, if that could be submitted for the record. I would appreciate it.

Mr. Glover. On the document you had before you, it is on page 49, sir. Page 49 is 1967 and 1974. On page 47 there is data that we presented before and it is in greater detail in the technical appendix.

Mr. Danielson. For the record, that is in the rather thick, detailed statement of Mr. Glover which is not in our file and which I am going to—I will defer judgment on whether to put it in the printed record

to Mr. Kastenmeier. But it is in that thick volume.

Mr. Glover. On page 119, if you wish to pursue this, Mr. Wiggins, or any of the other members of your staff, on page 119 in the technical appendix, there is further discussion. It begins on page 119 and there is discussion in that concerning the major sample calculation and so forth and so on.

Mr. Wiggins. Well, I will read that.

Mr. GLOVER. On page 49, there is information for the record

industry.

Mr. Wiggins. At first blush, it appears that the gross sales, the profit picture of the industry as a whole is pretty well tracked on a percentage basis, the same kind of gain that you reported to us is experienced by the publishers and the composers. Do you share that view? That is, if you put them on a graph, they just about track each other.

Mr. Gortikov. Except in our case, we are talking about profits.

Mr. Glover. That is not correct, sir. The owners of the copyright really are in a position of preferred stockholders because they get their take irrespective of whether the record industry as a whole or a record company or an individual record makes any money at all. So their earnings are much more stable, as we see in this data here, and the earnings of the phonograph recording industry fluctuates very substantially up and down, 1974 was a very good year for the industry, 1973 was a lousy year, 1975, I guess, is kind of a mixed bag.

1973 was a lousy year, 1975, I guess, is kind of a mixed bag.

Mr. Wiggins. Well, I was just making a quick comparison of the years 1967 and 1974. You did not go back to 1963 and this would go with regard to the composers, but I see that the net sales, for example, have approximately doubled in that 5-year period for the industry as a

whole.

Mr. GLOVER. That is correct.

Mr. Wiccins. I guess if we went back over a 10-year period the figure

would be even higher. It would be quadrupled.

Mr. Glover. In 1955, the sales were somewhere in the neighborhood of \$277 million, at list price. And list price was much more common then than it is now, in 1974. It is now up to well over \$1 billion, so there has been substantial growth.

Mr. Wiggins. Yes; indeed. The net profit, after income tax, on page

49, has better than doubled between the years 1967 and 1974.

Mr. GLOVER. Yes, sir; it has.

Mr. Wiggins. You had a bad year in 1973, and 1975 may be a bad year.

Mr. GLOVER. And 1971 was a bad year. It comes and goes.

Mr. Wiggins, I understand.

Mr. Glover. There is one point, if I could submit it, Mr. Wiggins. If you distinguish between aggregate profits and profits which are made in the United States, it should be perfectly clear that the profits made—these are using U.S. recorded masters abroad—that but for them, this has been a very sizable growth industry. But for them, the

profit picture of the record industry would be a very doleful picture.

Mr. Wiggins. The information you furnished earlier was really only meaningful to me insofar as it referred to the per release return. These are gross figures here. The gross figures may disguise an awful lot of poverty within the industry. You can have one person making \$1,000, and you can say he is a poor man, but if you get a million people making \$1,000, that is \$1 billion. But there are still a million poor people out there, even though the aggregate is a lot of money.

And so, the chart that indicated the return per release was a much

more meaningful figure to me than the gross figure.

Mr. GLOVER. I agree with you, and that is the proper unit of measure.

Mr. Danielson. Mr. Pattison.

Mr. Pattison. Let me put a question to the panel. Suppose, as you predict, the price has to be passed on to the consumer, and the consumer will resist that, and will not buy as many records, or will not buy any records, what would happen then? Why should we care about that, other than that you are all nice fellows, and everything, but why should we care about that? What is our role in worrying about that?

This is not the defense industry, or some essential industry. What is

our role in that?

Mr. Gortikov. Among the effects could be employment reduction. In terms of public interest, there could be less music available to the pub-

lic, which is one of the principles of copyright law.

Mr. Parrison. But would not the buying public be making that decision. Is it not up to the buying public if the price of a record goes to \$10, and very few people buy it? Is that not up to the public to decide to spend it on records, or on boats, or something else?

Mr. Gortikov. It is not your direct responsibility to assure that the

publishers or the record industry make profit in a given year.

Mr. Pattison. Or ever for that matter. And would there not be other kinds of adjustments that would be made? Would you not pay less rent? Would you not move to smaller stores? Would you not pay your help less money? Would you not increase your productivity? Do all those things that Adam Smith says you are supposed to do? And maybe keep the price of the record where it is, or even lower?

Mr. Gortikov. The public interest here is availability of music, employment, promotion of the arts, those matters that are associated with

copyright.

Mr. Pattison. I think the problem that we have here is that we are sitting as a very nonexpert body in a ratemal ing case, and with no capability, at least on my part, to make reasonable judgments about that. And I am very troubled by the whole notion that we should decide what the effect of another penny, or a penny less, or a dollar more, or anything else—we are not—we do not have the staff, or the capability of making those judgments, and it is really a very troubling kind of question.

Mr. Kapp. As I tried to point out in my statement, the publishers claim that the rate is negotiated, and since the bill would only raise the

ceiling, therefore, it is not an increase.

Mr. Parrison. Let me interrupt. Let's suppose you have 2 cents, or 3 cents—let's suppose you made it 15 cents per tune—do you think there would be negotiation then, or do you think it would go to 15 cents? Let's make it \$1 a tune.

Mr. Kapp. Negotiation is always a question of how far down you can go. I'd never be able to bring \$1 a tune down to the 2 cents level where it might be profitable, so using your example, I think we would be out

of business.

Mr. Pattison. But my point is, would not—if the effect is as you say, less records being produced, and less records being sold, would you not then be going back to the publishers and saying, look, we are not making any money, so we are not paying you 2 cents any more. We are not paying you 3 cents; we are not going to pay \$1. We are going to pay you ½ cent, and that is it, or else we are going to hire a bunch of people out of Juilliard School, and put them in the house here, and put them on the payroll, and create tunes, and have them assign their copyright to us as a part of the condition of their employment. I mean, would not those kinds of adjustments end up being made? I am not saying which ones would be made, but is that not all likely?

Mr. Gortikov. I can understand your concern about having to be a rate-setting body and the confusion from all the data that we present to you, but I think the essence is that the public is being very well served so far under the present system. I think the figures that we show, and the data the publishers are going to offer you, show nothing to dispute this. All parties are doing well under the system, and there is no need to change what works. So I think you have a very simplistic kind of problem, rather than a complex one, despite the preponder-

ance of the material we are offering you.

Mr. Danielson. I am going to have to interrupt. Mr. Gortikov said the magic word—that the others are going to offer some testimony. In order to insure that, with great regret we will bring this to a close. All time has expired on the opposition side, and we will now hear from

those in favor of the rate increase.

While they are coming forward, thank you, gentlemen. We appreciate your help. While they are coming forward, I will state that the first witness we have a reduled is Mr. Leonard Feist, executive vice president of the National Music Publishers Association; vice president of the Copyright Society of the U.S.A.; member of the State Department Panel of Experts on International Copyright; and member of the U.S. delegations on revision of the Berne Convention and the Universal Copyright Convention. That is a rather intimidating introduction. But I do not scare very easily, so, Mr. Feist.

TESTIMONY OF LEONARD FEIST, EXECUTIVE VICE PRESIDENT, NATIONAL MUSIC PUBLISHERS ASSOCIATION

Mr. Feist. I would like to make very clear that I am appearing here today on behalf of the National Music Publishers Association, and not in relation to any of the credentials which you so kindly recited.

Mr. Danielson. Thank you. We understand that.

I am going to recommend that we move the microphone up closer to Mr. Feist, as I am sure the folks on the back row are as interested in hearing as I am. Thank you.

Mr. Feist. In addition to myself, speaking on behalf of the American Guild of Authors and Composers are Messrs. Marvin Hamlisch;

and Eubie Blake, and on behalf of the music publishers Mr. Robert Nathan and Mr. Ralph Peer. These gentlemen were identified on the fact sheet that was previously submitted to you, along with our comprehensive statement which we have submitted for the record.

Mr. Danielson. Mr. Feist, so that all of us can make sure that we know what we are following, it is my understanding that you and your

associates have supplied this statement, which I am holding up.

Mr. Feist. That is correct.

Mr. Danielson. Now, what you are really doing is extracting some of the pearls of this statement?

Mr. Frist. The individual witnesses will comment on the statement,

itself.

Let me say, by way of introduction, as Mr. Drinan has indicated, the Federal Government should not be telling us what to request when we negotiate with a record company. We are not selling oil; we are selling creative genius. But if it is too late to unscramble these eggs, and the Government must fix some ceiling, then please set it high enough to allow some room for bargaining. The higher the ceiling, the

more bargaining there can be.

Most songs are not licensed at the ceiling level, and will not be under the new ceiling. Three times over the past ten years, I have sat in congressional hearings and heard the record companies make the same predictions of doom that they have made today. All of the statistics that you have just heard expect you to overlook two facts, first, that the royalty in the statute is a ceiling, and increasing that ceiling only increases the range for bargaining, and not the rate actually paid for every song. Second, at your hearings 10 years ago, the record industry predicted that a 1-cent increase in the ceiling would push them to increase the price for an album by 20 cents. Since then, without any change in the laws, they have in leased the price of each album by \$3 or more, without any of their dire predictions coming true. Nor has any of the 112 percent increase in the price the public pays per recorded song gone to the creators of that song, although where would the \$2 billion business be without us all?

Ten years ago, this subcommittee approved the 2½ ceiling, 2½ cents. A song that sold 25,000 recordings could not even earn \$700 for its creator; nevertheless, all we ask today is a ceiling with the same purchasing power as 2½ would have provided 10 years ago. That means at least 4 cents. Even a 4-cent ceiling would give us less real earning power, and a smaller share of list prices than it gave us 10 years ago. But at least a 4-cent ceiling would give the creators of

American music some hope of negotiating a fair return.

Mr. Nathan is our next witness.

Mr. Danielson. This is Robert R. Nathan, of Robert R. Nathan Associates, Inc., consultant economist.

TESTIMONY OF ROBERT R. NATHAN, ECONOMIST AND ATTORNEY;
PRESIDENT, ROBERT R. NATHAN ASSOCIATES; FORMER VICE
PRECIDENT, AMERICAN STATISTICAL ASSOCIATION; FORMER
VICE PRESIDENT, NATIONAL ECONOMISTS CLUB; MEMBER, TIME
MAGAZINE BOARD OF ECONOMISTS; CHAIRMAN, PLANNING COMMITTEE, WAR PRODUCTION BOARD; DEPUTY DIRECTOR, OFFICE
OF WAR MOBILIZATION AND RECONVERSION

Mr. NATHAN. Thank you, sir.

Mr. Chairman, and members of the committee. I have had the pleasure of working with the music publishers on this issue and others for a number of years, and I did have the opportunity to appear here when

this issue was first presented.

And let me say very strongly, as an economist, that in my judgment, the Government determination of a ceiling rate has no place in our general economic environment. I agree wholeheartedly with one statement in Mr. Gortikov's presentation this morning: there is no monopoly on music, and plenty of music is available to the public. Thus the setting of a ceiling in 1909, 66 years "go, provides no rational basis and no sound reason for the continuation of that ceiling at this time or, as far as I can see, for the foreseeable future.

From the economic point of view, given the tens of thousands of composers, and perhaps hundreds of thousands of would-be composers in this country, and given the large number of record companies—although the record industry is highly concentrated, relative to music publishing and many other industries—there is no monopoly, and no other understandable or justifiable reason for continuing this practice. We ought to ask ourselves—and I think Congressman Patti-

son did—why the ceiling, why the provision?

Mr. Pattison. Mr. Drinan asked that.
Mr. Nathan. There is not a national security reason, nor do I see any other reason. Now, if this committee, and if the Senate and the Congress jointly were to decide to continue this provision, which I find not justified from an economic point of view, then it seems to me the next best thing—not the best, but the next best thing—would be to open up the opportunity for increased ranges of bargaining. That is primarily why we recommend very strongly that if continuation of the ceiling rate is called for, as provided in legislation, then the range for bargaining ought to be increased, very substantially. That is a fundamental position which I would like to emphasize strongly.

The second issue that I would like to discuss rather briefly—and I have a chart to demonstrate it in a moment—is the nature of this ceiling rate. Ten years ago, my associates and I undertook an extensive survey of a large number of licenses handled through the Harry Fox Agency, which accounts for some two-thirds of the total funds that are paid as mechanical royalties, and we found then a very substantial range of arrangements between the publishers and the

record companies.

Now, I do not care how you sweep this thing under the rug, there is no question there are very substantial ranges, and even in the presentation of Dr. Glover this morning, if you look, you will find that approximately half of the arrangements are below the 2 cents ceiling. One can call these stereotyped or categorize them in some other way, but basically, there are very substantial portions of the total amount of royalties that are paid, the total number of the licenses that are negotiated, and the recordings or selections sold, that are set at substantially below 2 cents. There is bargaining.

In 1965, when we undertook this study, we found that the average royalty rate was 1.51 cents, and now it is 1.62 cents, so the average is still well below 2 cents. There is bargaining. Every publisher to whom I have ever talked will tell you that bargaining goes on, and they can

speak for themselves.

The main issue that is presented here, with respect to a variation from the 2½-cent royalty ceiling which the Congress enacted 8 years ago now, concerns the matter of inflation that has taken place since then. I would emphasize again that I am talking here about a rate, a royalty rate, not aggregate numbers. If one tried to compare, say the price index with aggregate numbers, one finds that in any growing or expanding area, the aggregate numbers will go far beyond the price index. It is a meaningless comparison. For instance, if one went back to 1909, and studied the automobile industry, I would be surprised if automobile sales today are not a thousand, or many thousand times over what they were in 1909. To say that the cost of living has gone up sixfold, whereas automobile sales have increased a thousandfold, means, that the automobile prices ought to be where they were in 1909, is, I think, a meaningless comparison. Here, we are talking about a rate, which is a price, which is a unit cost, and the royalty rate, I think has to be looked upon in that perspective.

Now, if I may turn just briefly to the charts. The first chart I have—and by the way, I am only showing here only some of the charts from the numbers that are included in this presentation for you. But here we see a chart, the Consumer Price Index from 1965 through July 1975. You see a phenomenon which is just as disturbing, I am sure, to every member of this committee as it is to most citizens in the United States: we have had a very serious inflation in this country. Prices have risen very substantially, to an unprecedented degree in the entire

peacetime history of this country.

Since 1965, when testimony was presented on this issue before this committee, we have had an increase, of some 72 percent in consumer prices. I also did a projection for January 1976 on, I think, the unrealistic expectation when I did this that the bill might be enacted and implemented by then. We would expect about a 78-percent price increase from 1965 to January 1976. Or if we looked at the series on any

other basis, we find a very substantial amount of inflation.

Now, if I may turn to another chart. Here we find Chart No. 4. It is entitled Purchasing Power in July 1975, and in January 1976, of the 2½-cents royalty ceiling rate, either in 1965 dollars, when the testimony was presented before this committee in 1965 prices, and in 1967 dollars, when the 2½-cents royalty rate was enacted. Let's look at just 1967; we find that in July of 1975, 2½ cents enacted in 1967 will now buy only 1.54 cents of the same goods and services as at that time. In other words, the buying power of that 2½ cents, in those prices, has shrunk to about 1½ cents. Roughly, the same thing would be true next January. So we see what has happened in terms of inflation.

Now, the next chart is chart No. 3. I reversed these. This shows, gentlemen, the key element that we are proposing here, namely that if the 2½ cents in 1967 were considered an adequate ceiling rate of payment in terms of its command over goods and services, then that 2½

cents is hopelessly inadequate today, because of rizing prices.

If we looked again at only 1967, if today this Congress said we want to preserve that 2½ cents we enacted in 1967, and wanted to have the same buying power, in July 1975, the ceiling would need to be 4.1 cents per selection. Next January, it would need to be 4.2 cents. So here we see the rayages of inflation in terms of the impact. This is why we are saying, in a meaningful sense, that a 4-cent-plus ceiling royalty is needed for reasonable terms.

Now, if I may move on to the next chart, chart No. 6, very briefly, which chart shows the percentage of selections and total payments and licenses which fall below the 2 cents ceiling. Here, I would like to emphasize that we did not include a superficial sample. We took the top three record companies which accounted for more than 40 percent of the payments through the Harry Fox Agency which, I said, in turn account for some two-thirds of the total mechanical royalty payments. We included in our sample something in the nature of 145 million selections, namely the actual sale of musical compositions. If there happen to be 10 selections on every album, and this was nothing but albums in the sample, then we would have included in our sample a total of 14.5 million sold albums.

We show here that the percentage of selections in the fourth quarter of 1974 below 2 cents was 54 percent. That means that the number at 2 cents, and there are, as Dr. Glover pointed out correctly, a few over 2 cents because of payments on a time basis rather than on a cent basis, that 46 percent were at 2 cents or above and 54 percent below 2 cents. And if you look at the total royalty payments, 40.2 percent are under the 2-cent level. That is so because there is a weighting factor, all those at 2 cents would be weighted more in the money column than

they would in the number column.

Then we have the number of licenses: 67.6 percent are under 2 cents. And gentleman, we are very happy to give you every detail of that sample to present to your staff or anyone else you would like: the tabulations, the computations, the results in greatest details. We feel that the establishment of this as a ceiling is very clear and definitive.

Now this next chart, chart No. 5, shows the breakdown of selections, by rate. Here you see that 46 percent I quoted before: 3.4 percent of selections were over 2 cents and 42.6 percent were at 2 cents. And that adds up to 46 percent. Then we find that between 1.5 cents and 2 cents we have 2 percent: at 1.5 cents we have 29 percent; between 1 and 1.5 cents we have 1.7 percent; at 1 cent we have 10.8 percent; and under 1 cent we have 10.4 percent. If this can be characterized as nice and simple and orderly variations with everything except standard variations at 2 cents, then I must say I do not know how to read charts or numbers, and I am not willing to concede that.

It is quite clear that what we have here is a ceiling and not a rate. Now if I may move on to the next chart, chart 8, we also took a careful look at what has happened to the prices of records. We took the 200 top albums in Billboard, except in 1965 with 150 top albums, and we looked at what the most prevalent price is, what economists and statisticians call the mode. We found that \$3.98 was the most prevalent price in 1965, \$4.79 in 1967, \$5.98 in 1974, and the latest figure this year is \$6.98. This gives us a pretty good idea of what has happened in terms of list prices.

I must say we have looked for and have no evidence whatsoever that would lead us to conclude that discounts as a percentage of the list price are any greater today than they were 10 years ago. In my judgment, given the nature of the inflationary process, I would expect that the discounts from the list prices would be lower today than they were then. And therefore if we did have the actual discounted prices, I think, we would find an even larger price increase than we

find in the list prices.

Now, we have just one other chart, chart 12; this shows the royalties per album at the 2-cent ceiling, as a percentage of the most prevalent album price. For instance, in 1965 you will recall that the prevailing price, the most predominant price, was \$3.98, and at that time even if we use the ceiling royalty rate of 2 cents, that would be 24 cents with 12 songs per album. And 24 cents would be 6 percent of \$3.98.

Now if we move to the present time, we find the most prevalent album price is \$6.98, and we also find the most prevalent number of compositions per album is down to 10. Therefore if we take the \$6.98 and divide it by 10 compositions, the average price per composition is roughtly 70 cents; the royalty rate of 2 cents comes to 2.9 percent of 70 cents.

This shows royalties at the ceiling rate as a percentage of the most

prevalent album price dropped by more than one-half.

Now, I want to try to summarize what this particular set of charts means to us. First of all, Mr. Chairman and members of the committee, the repetition of figures does not prove wrong figures to be correct. I must say I cannot understand, in a situation like this, where you have a ceiling and variations substantially below the ceiling, how anybody can take a 1-cent increase from a 2-cent royalty to a 3-cent royalty and say that the increase in royalties will be \$47 million because you literally apply 1 cent to every composition and you just add it up assuming that every composition is going to be increased 1 cent. Today we have half of the records with a payment at less than 2 cents. I find nothing in economic experience, nothing in economic theory which would indicate that every single negotiation would lead to a 1-cent increase. I am sure the record manufacturers are not so generous in their undertakings that the prices they pay today are higher than what they need or want to pay As the publishers will tell you, they do bargain to the fullest extent that they can, and succeed in substantial measure.

Saying that if there were a 1-cent increase, it would result in a \$47 million increase and repeating that several times, does not make that figure correct. I might say that Mr. Gortikov sells himself short. He said, if it is 1 cent, it is \$47 million, and he said it was \$84 million at 2 cents, but double \$47 million equals \$94 million.

Mr. Danielson. And he corrected himself.

Mr. NATHAN. The second point, gentlemen, is that you would not get anything like \$47 million. But even if you did, you would not get more than double that through the various distributive channels; in that case you would have a cost of \$47 million resulting in an increase of \$50 million in profits, and I do not think that is quite the way our system works.

So to briefly summarize, let me say this. What we have here is a unique phenomenon that has no piace in our pattern of economics. I think it should be removed entirely. But if we must come to the conclusion that if this royalty arrangement, which is a ceiling, is not removed, then the logic is to open it up so that the marketplace, competition, bargaining can work its way through this whole process.

I see no basis, no criteria, no considerations on which one could logically come to a price determination through the legislative procedure. You gentlemen sitting here today have had evidence presented

before you as to the fact that the ceiling is a rate or that the ceiling is not a rate. I do not understand how a congressional committee can possibly deal with that kind of subject in that kind of detail on a purely rational basis. Nor do I understand what the economic rationale would be to give a set of criteria to some kind of an organization to

set rates as has been done for the public utilities.

I believe that the ceiling should be removed entirely; but if it is not, then it ought to be opened widely for negotiation. What we are dealing with here is a rate and the cost-of-living is a very important factor influencing all rates. You can tell the AFL-CIO, or the Government workers or the Federal Reserve System or any bank that they are making a lot of money and wages or interest rates should not be allowed to increase. They will not accept such curtailments in buying power. The important thing is that you must take account of bargaining considerations. The lack of an impact on changes in rates has buying power as a result of rising prices. I very strongly urge this committee to take this into account and to raise that ceiling to at least 4 cents. It will be a ceiling and everything is not going to go up by the same amount, or even in the same proportion—I think that is the second best solution. It certainly will give ample reign for some effective bargaining.

Mr. Danielson. Thank you, Mr. Nathan.

[Prepared joint statement of American Guild of Authors and Composers and the National Music Publishers Association follows:]

JOINT STATEMENT OF THE AMERICAN GUILD OF AUTHORS AND COMPOSERS AND THE NATIONAL MUSIC PUBLISHERS ASSOCIATION

SUMMARY

Since 1909, America's songwriters and other musical copyright holders have by statute been denied the right to bargain with the record companies for a royalty higher than 2¢ per song, to be divided among composer, lyricist and publisher.

The record industry has become a multi-billion dollar industry but our maximum is still 2¢. The actual average paid is 1.62¢.

The Copyright Revision Bill proposed by the Register of Copyrights in 1964 after a series of panels and studies recommended 3¢. After the record industry warned that this could produce a horrendous 12¢ increase in the \$3.98 price of a long-playing record (which now costs \$6.98 or more), the House compromised on a ceiling of 2-1/2¢.

Two and one-half cents! A song that sold 24,000 recordings could not earn for its creators more than \$600.

Today that 2-1/2¢ ceiling is worth less than 1-1/2¢. Merely to restore our ceiling to the same level of purchasing pow prevously approved, we need a ceiling of more than 4¢.

In this past decade, the Consumer Price Index has risen by more than 70%; the standard rate for 3 hour recording sessions for musicians has increased 64%; record industry sales have increased 190%; the list price per song in a typical record album has increased 112%; but total royalty payments to musical copyright holders by the record industry, according to its own figures, have declined as a percentage of industry sales by 32%. Royalty payments per songwriter have also declined. And yet the record industry -- dominated by four giants -- still wants Congress to permit no negotiations, no discussion, no bargaining above 2-1/2¢.

When $2-1/2\not\in$ was approved it represented roughly 8% of the price per song. Now it's 3.6%.

A 4¢ ceiling instead of 2-1/2¢ would not fully restore this ratio of royalty ceiling to prices; nor would it fully restore the purchasing power of 2-1/2¢ in 1965. It would do little or nothing for the majority of songs not able to reach even 2¢ today. Even if every one of the 10 songs on a typical record or tape were able to command the full 4¢ instead of 2-1/2¢, that additional 15¢ per record would represent only 2t of today's price and only 5t of the last decade's price increase.

But it would gave the creators of American music a fairer chance to seek a fair return.

SUPMARY TABLE
Why the 2.5 Cent Mechanical Royalty Ceiling Approved After the House Hearings of 1965
Hust be Raised to 4 Cents in 1975

I. The Ravages of Inflation 1965	ntlation	Consumor pricos (1) (1) 472, 77pical mumber of annes	, , , , , , , , , , , , , , , , , , , ,	80000	(3) (3) (3) (4.36	Average royalty actually rad per recorded song under present 2c paid colling In 1965 dollars dollars 1.51c 1.51c 5.3c 1.62c 0.99c +71 -314 5.3c Total royalty payments made to copyright hold- made to	iard rate musicians NYC re-ng scasion [5]	rederal salary (S-12, step j (S-12, step j (6) (6) \$10.250 \$18,463 +804 Royalty payments per songyriter
	mngre 27	per album	cypical album (9)	typical album (10)	sales (11)	the Apercentage of Industry sales (12)	wong- writors (13)	In In Curront 1965 dollars (14)
1965. 1975. Percent change	\$3.98 \$6.98 +75\$	10	33¢ 70¢ +112 4	3.64	5758 mil. 52.2 bil. +190%	\$758 mil. 5.68 \$3.81 +1904 -328 -328 Percent of typical price per song	17,336 55 35,350 55 +1024 Purchasing power	17,336 \$2,424 \$2,424 35,350 \$2,362 \$1,375 +1024 -31 -/34 Purchasing power in 1965 dollars
III. Even 4¢ Hill Chly Partially Repair the <u>Effects of Inflation</u> 2.5¢ in 1965. 4.0¢ in 1975. Percont change.	ly Partial	Mill Cnly Partially Repair the Of Inflation 1965. 1975. Change	e de la companya de l			7.61 5.71 -251	22	2.5 ¢ 2.33¢ -74
- 1					Percent of per re	Percent of typical price Perc per record, 1975 (17)	Parcent of increase in typical price por record, 1965-75 (18)	n typical price 1965-75
IV. And Result in an Insignificant Increase in Costs at Most 150 max, increase on typical record (1.56 x 10) Sources are presented at the end of this statement.	Insignifi e on typic at the en	icant Incre	1.56 × 10					

Joint Statement
of the
AMERICAN GUILD OF AUTHORS AND COMPOSERS
and the
NATIONAL MUSIC PUBLISHERS ASSOCIATION

submitted to the
Judiciary Committees of the U.S. Congress
regarding copyright revision
(S. 22) (H.R. 2223)
(Sec. 115(c)(2))

September 1975

We the creators of American music -- the composers, songwriters, lyricists and publishers of nusical works -- respectfully petition Congress to permit us to seek a fair compensation for the recording of our work.

PART I.

A FAIR CEILING ON OUR RATE OF COMPENSATION: 4 CENTS

In the past we have sought the right to bargain freely with the record industry without any statutory ceiling on our earnings. The authors of books and the composers of dramatic musical works have that unrestricted bargaining right; so do recording engineers and musicians and manufacturers. There is, after all, no monopoly, no shortage of supply, no public utility chracteristic, affecting the song writing and song publishing business. But that right to bargain freely has been denied us.

In the past we have sought the right to share in the enormous price increases obtained by the record industry for recordings of our songs, by converting that statutory ceiling on our royalty rate -- if there must be one -- from a flat cents per unit figure to a percentage of record prices. Recording artists and producers obtain this kind of percentage share of record prices; so do musical copyright holders in Europe and other countries. But, for U.S. musical copyright holders, that right to a fair sharing has been denied.

Instead we must continue to bargain with the giants of the record industry under a one-sided statutory ceiling that arbitrarily fixes the dollar maximum we can hope to receive but does not assure us of any minimum. Because Congress adopted in 1909 a system of compulsory licensing for the mechanical reproduction of music (for fear that one

rpiano roll company might otherwise obtain a monopoly), the royalty for a musical copyright is not negotiated freely in the market place today -- like virtually every other royalty or rate of earnings in this country. But if it is not now feasible to abolish this system entirely, if "political reality" makes it necessary for the 94th Congress to fix our negotiating ceiling, then at least it should be set high enough to give ample range for the bargaining process.

In 1967, after 58 years of our being required by statute to accept a ceiling of no more than two cents a song for each record manufactured -- 2¢! -- the House of Representatives, in passing the same comprehensive Copyright Revision Bill that remains before Congress today, voted to compromise the 3¢ ceiling recommended by the Register of Copyrights at two and one-half cents. Two and one-half cents was not a fair or adequate ceiling. It represented about one fourth of the purchasing power that the original 2¢ ceiling itself represented when first adopted in 1909. At 2-1/2¢, even a song that sold 24,000 ½/ recordings could not earn for its creators more than \$600, to be divided among the composer, lyricist and publisher in accordance with their private contractual arrangements.2/

But if 2-1/2¢ in 1967 did in fact represent the House's considered judgment as to where the "mechanical royalty rate" ceiling for musical copyright holders should be fixed, then in 1975 that ceiling in all fairness should have at least the same relative purchasing power. Because of the tremendous inflation since 1967, we need a ceiling of at least 4¢ per selection in 1975 if Congress is merely to fix the ceiling at the same level as the House did previously.

A Decade of Inflation

That 2-1/2¢ ceiling was adopted as a compromise by the House Judiciary Subcommittee on Copyright in 1966 on the basis of its 1965 Hearings in which the testimony relied largely on 1964 data. The House itself then ratified this figure in 1967. Compared with today, 1964-1967 was a time of very different economic conditions and dollar values in this country. Since 1964 the Consumer Price Index has risen by more than 70% (and since 1967 by more than 60%). That two and one-half cents today would buy only what one and one-half cents bought in 1964-67. To equate 2.5 cents in 1964 dollars or even 1967 dollars in today's purchasing power now requires more than 4 cents; and by the time this bill could take effect next January 1976 (at the earliest), approximately 4-1/2¢ will be required to match that 2.5 cents.3/

During this decade of inflation, as record companies doubled their price per song without one cent of the increase going to the composer, as the standard rate per 3 hour recording session for musicians increased 64%, and as record artists, producers and company officials obtained higher and higher wages, salaries and royalties, the average royalty per recorded selection paid to the creators of the music (the only group unable to obtain an inflation adjustment without Congressional action) actually fell by more than one-third. With the 2¢ ceiling still in effect, the average royalty fell, in terms of 1965 dollars, from 1.51 cents per song in 1965 to less than .99 cents per song in 1974. 4/

For Congress to allow this steadily shrinking real rate of compensation for music creators and their families to continue, by freezing the statutory ceiling at the level originally approved by the House in the 1965-67 period --while leaving record companies, the rest of the music industry and virtually all other segments of the economy free to increase their prices and earnings -- would be crossly unfair and in our society unprecedented. Congress has recognized the ravages of inflation in Social Security, in civil service and military pensions, in governmental salaries and in other legislation; and it cannot in good conscience fail to take account of it here, particularly in setting not a fixed rate but merely a ceiling rate.

A Reasonable Base for the Tribunal

If in the future a Copyright Tribunal, as proposed in Chapter 8 of the pending bill, is to review periodically the mechanical royalty rate ceiling set by Congress in order to consider subsequent developments, then Congress has a special obligation to make certain that the basic level it now fixes represents the fairest figure as of the date of the law's enactment. If the bill soon becomes law, the Tribunal can at its first review take into account any increase or decline in the ceiling's value or other developments occurring between now and then. But the unprecedented inflation since 1965 -- which before this bill becomes law will have cut the value of the 2-1/2¢ based on that year's data almost in half -- is for this Congress to take into account. Fixing a 1975 ceiling below 4 or 4.5 cents would not only give musical copyright holders less than the House was willing to give them previously but also give the Tribunal an artificially and inequitably low base for its future calculations.

We have not the slightest doubt that, had this bill become law a decade ago, as intended, with the 2-1/2¢ ceiling included, a Copyright Tribunal meeting today would (a) take note of the 72% increase in the cost of living, (b) take note of the even greater increase in the price per recorded song received by the record industry, and (c) adjust the ceiling to at least 4¢ in order to give musical creators an opportunity to negotiate for no less than Congress had intended to give them originally. Although the law was not enacted a decade ago, there is no reason why the creators of music should be penalized by this prolongation of the legislative process. Today Congress and its Committees must act as that "tribunal" for purposes of this simple inflation adjustment.

A Ceiling, Not a Rate

Bear in mind that whatever figure is adopted by Congress will serve merely as a ceiling on negotiations and not as the actual rate paid. Musical copyright holders are of course willing to negotiate with any and all legitimate record companies for mechanical licenses on any and all compositions (and would do so even in the absence of statutory compulsion); and thus virtually every license has long been issued without resort to the compulsory licensing provisions of the statute. But inasmuch as both parties know that it would be useless for the copyright holder to request more than 2¢ when any record company can always invoke the statute and thereby obtain a compulsory license at that level, all negotiations (with the customary exception for those few involving compositions of extended length) necessarily take place beneath that absolute ceiling. Similarly, if the record company argues that a song is not even worth 2¢, there is no point in the copyright holder's "insisting" on the statutory ceiling because the statute will never be invoked. Thus even today, when there has been general agreement in the industry that the 66-year old 2 cent ceiling is outmoded and inequitable, negotiations on the royalty fee to be paid for most songs are still concluded at rates below that 2 cent level, with an average of 1.62¢ per song(less than .99¢ in 1965 dollars).5/

Clearly, therefore, raising the negotiating ceiling from 2¢ to 4¢ would not require any record company to increase its royalty payments to that level or by that same amount or percentage. Nor would it assure composers and publishers of receiving any increase of any amount. It would merely grant us permission to negotiate under a more realistic ceiling. As the Register of Copyrights recommended some years ago, if

bargaining is to play any role at all,

"the statutory rate should be at a high end of a range within which the parties can negotiate ... for actual payments of a rate that reflects market values." 6/

A song of truly "hit" potential today, for example, is obviously worth far more than 2-1/2¢ per record. Were there no statutory ceiling, its creators would obviously receive more than the 3 cents per record allowed by the 1974 Senate bill. Even an inflation-adjusted ceiling of 4¢ or 4.5¢ per record would still help record companies hold down the compensation due to the author of a real hit. But at least the higher figure would allow some additional room for bargaining which 2.5¢ or 3¢ does not.

In short, if a creator's song is certain to be among the very limited number of popular best sellers and the record industry is anxious to get it, it would be harsh and unfair to put an artificially low lid on creativity by denying that creator the right to seek more than 2-1/2¢ or 3¢ per record. But if a record company realistically values a new song at only 1¢ per record, and the copyright holder lacks the certainty of success to insist on more, then he will only get one cent per record for that song regardless of where the statutory ceiling is set.

Thus a 4¢ ceiling would not be a guarantee; for most songwriters it would not even be a hope. Even the creator of a sure-fire popular "hit" will not be assured of full and fair compensation for any one of his songs; but at least it will grant him the right to seek it. For most songwriters, their period of top creativity and marketplace acceptance is severely limited; and it is grossly unfair to restrict so harshly their ability to make the most of that brief period.

The Unfair Bargaining Power of the Record Companies

One reason the majority of licenses go for less than 2¢ today, and will in the future go for less than any new ceiling adopted, is the powerful market position of those major record companies with whom the creators of a song must deal if that song is to fulfill its potential for success. Of all the royalty payments made in 1974 through the Harry Fox Agency in New York (which acts as collection agent for the vast majority of such payments), over half were paid by only four giant record companies, constituting less than one-half of one percent of the members of the

industry. (Not even the 21 largest music publishers of the many thousands competing for royalty payments can account for even half of the royalties received.) 7/

For better or worse, it is a fact of life that hundreds of thousands of copyrighted but unrecorded songs offered by tens of thousands of eager writers, composers and publishers compete for the right to record. This places these few dominant record companies in an invulnerable position to pick, choose and bargain. As pointed out by the Register of Copyrights in his 1958 Report to the House of Representatives, the compulsory license is

"compulsory only on the copyright owner... the record producer can bargain for a lower rate, but the copyright owner can never bargain for a higher one." 8/

Because the number of writers and composers has more than doubled during the last 10 years, increasing far more rapidly than the increase in the mechanical royalty pool, the average writer-composer's gross receipts from this source have actually declined -- even without taking inflation into account.9/ Many of these write not "pop" best-sellers, but for children, gospel, classical, Latin, country and other markets. For this handful of enormous record companies now to be arguing that Congress should hold down the ceiling rate on their negotiations with these individual composers and publishers is ludicrous.

Thus the dispute before Congress on whether Sec. 115 should provide 3¢ or 4¢ or some figure higher or in between is nothing more than a dispute over negotiating room. The record industry, no doubt acknowledging internally that the song is the key ingredient in the sale of a \$6.98 disc or \$7.98 tape or cassette recording 10/ -- after all, without it, what would they have to sell? -- wants Congress to keep the tightest lid possible on the bargaining position of the songwriter by preventing the negotiators, even on hit songs, from even discussing 4 cents. (Of course, these record companies would not be willing to have Congress grant every broadcaster a compulsory license to use their recordings for a paltry royalty or have Congress fix the retail prices of their recordings below the market level. Yet they somehow believe that such restrictions on the rights of composers are justified.)

All that we the musical copyright holders are asking of Congress is not a guarantee of 4 cents per song but room to negotiate if we can a fair and realistic royalty up to that level on those occasions when market values

7.

enable us to do so. The Copyright Law was intended, after all, to protect the creators of American music, not the "giants of the entertainment industry. If Congress were to keep the ceiling at an unrealistically low figure such as 2.5 or 3 cents in the face of a substantial decline in the value of the dollar, thus permitting bargaining only below that level but never above, it would convert this already one-sided compulsory license provision into a still harsher anti-composer statute.

PART II.

THE BACKGROUND OF THE MECHANICAL ROYALTY ISSUE

The 1909 Act

In 1909, for reasons set forth in the footnote, the concept of a "compulsory license" was introduced into law. For 66 years musical composers, lyricists and publishers have been tied to this same archaic 2¢ ceiling. Piano rolls gave way to discs, which gave way to long playing records, which are now giving way to tape cartridges and cassettes, each more highly priced and more highly profitable than its predecessor. Radio and TV entered the scene, the U.S. population more than doubled and the Gross National Product rose by more than 4000%. But still -- although the copyright proprietors and record companies did adopt with the advent of long-playing records the custom of a 1/4¢ per minute minimum for long compositions -- the statutory mechanical royalty rate has through it all remained at 2¢.

The Current Revision

In 1956, when the process of revising the outdated Copyright Act of 1909 was begun with a series of studies and panels, the Register of Copyrights initially recommended total elimination of the compulsory licensing provision. This recommendation was bitterly fought by the second industry, and its point of view prevailed. Thus the first draft of the new law in 1963 retained a compulsory licensing provision. But it did provide that the statutory royalty rate would be, as in Europe, a percentage (8% of retail list price) rather than a fixed sum, thereby safeguarding everyone's interests in the decades of economic and technological change that lay ahead. But once again the record companies were opposed, once again their powerful opposition prevailed, and the second draft of the new bill in 1964 maintained the concepts of both a compulsory license and a statutory ceiling on royalty rates fixed in dollars and cents terms.

The ceiling embodied in that second draft was at a compromise level of 3¢ per composition. To the surprise of the composers and publishers, the Recording Industry Association of America was still opposed and attacked this proposal at the House Judiciary Subcommittee Hearings of 1965. An elaborate RIAA statistical presentation argued that the billion dollar record industry was actually operating at a marginal profit, that even the 2¢ ceiling was excessive, and that a 3¢ ceiling threatened to raise the retail price of \$2.83 records to \$3.03 (they now are listed at \$6.98 and more). The Bill finally reported by the House Judiciary Committee in 1966 and passed by the House early in 1967 (H.R. 2512, 91st Congress) "compromised" the ceiling still further at 2-1/2¢.

In 1969, after additional Senate hearings, a lengthy Library of Congress economic analysis of the recording and music publishing industries 'the "Knight Report") requested by the Senate Judiciary Subcommittee reported doubt as to whether available data could be certain of the economic effect of whatever statutory figure was to be adopted, noting that this figure would serve only as a ceiling beneath which "the actual rates charged would depend upon prevailing market conditions and the relative bargaining strength of the parties involved."12/ This same fact that the statutory rate is a ceiling had also been emphasized by the Register of Copyrights in his Report (Part 6) to the House of Representatives in 1958:

"... If the present 2 cents ceiling is raised, licenses could still be negotiated at 2 cents or less if current market conditions did not justify more; and if a higher ceiling resulted in negotiated licenses at more than 2 cents, it could well be argued that a 2 cents ceiling had proved to be too low." 13/

The copyright proprietors cought as a matter of equity to restore in the Senate Subcommittee the concept of a percentage royalty rate ceiling -- 8% of the suggested retail list price -- instead of a fixed rate; but this effort was again defeated by the record industry.

Finally, in 1974, the Copyright Revision bill which was reported by the Senate Judiciary Committee and passed by the Senate returned to the 3¢ ceiling originally recommended by the Register of Copyrights and introduced in the House back in 1964. That bill has been reintroduced in both Houses this year.

PART III.

THE ECONOMIC CONSEQUENCES OF A 4 CENT CEILING

Costs

As pointed out in Part I, raising the ceiling will only increase the room for negotiations. It will not weaken a record company's bargaining position, automatically raise any actual rates or costs, guarantee any return to composers or enable the kind of song that was previously unable to earn 2¢ to suddenly earn more. Only the kind of song that has been penalized by the 2¢ ceiling because it deserved and could have earned more -- if the parties had been free to bargain for more -- will definitely be affected. Equally obvious is the fact that all existing licenses which specify a figure will remain at their present level, averaging as noted above less than 2¢.

For these reasons there is simply no basis whatsoever for record industry assertions -- on which all their
dire calculations appear to be based -- that an increase in
the statutory ceiling of 2 cents would automatically result
in a proportionate increase in the cost of music for their
industry, their consumers, and their customers in the jukebox industry. The 1969 Library of Congress Report to the
Senate Judiciary Subcommittee politely termed "highly conjectural" the record industry's contention that "an increase in
the statutory rate would simply involve an automatic and
proportional increase in existing mechanical royalty fees."14/

Moreover, in the light of both record company profits and the prevalence (acknowledged by the RIAA testimony of 1965) of retail record discounting, the record industry's insistent claim that all royalty increases -- plus mark-ups as well -- will be passed on to the consumer (including the juke-box industry) is simply unsupportable. But even if we were discussing a guaranteed 4¢ rate instead of a ceiling, even if every song on that typical 10 song record were now paid at the ceiling rate and would all be paid at the new 4 cent ceiling, even then that increase of 1-1/2¢ per song over the 2-1/2¢ per song set by the House Committee in 1966 would constitute at most a cost increase of only 15¢ per record.15/

-- A maximum 15¢ per record increase -- only 2% of today's typical \$6.98 list price -- over a decade during which the cost of living has risen more than 70% is hardly exorbitant.

-- a maximum 15¢ per record increase is only 5% of the total amount by which the industry has increased the price of that typical record over the last 10 years.

-- a maximum 15¢ per record increase (a 4¢ instead of a 2-1/2¢ royalty per song) would still give those who created the music a much smaller share of the current purchase price per composition on today's typical 10 song album than the original 2-1/2¢ per song would have given us on the typical 12 song album back in 1965. (Nor, as already demonstrated, would that 4¢ today purchase as much as 2-1/2¢ would purchase in 1965.) 16/.

Prices

Indeed it is the record industry's own history of price increases over the last ten years that destroys the credibility of its renewed protestations on the consumer's behalf. Before the Members of the House and Senate Judiciary Committees consider this year's presentation of economic prophecy by the Recording Industry Association of America and its consultant Professor Glover, they should contemplate their Judiciary Committee's summary of the same predictions made by the same Association using the same consultant to the House and Senate in 1964-1967:

"On the basis of the situation existing at the time of the hearings, the record producers predicted an increased price to consumers of 20 cents per \$3.98 longplaying record, or a total of possibly \$30 million per year, if the statutory rate were raised to 3 cents. This prediction assumed that the record manufacturer could not absorb any of the 12-cent increase on a record containing 12 selections, and that record marketers in turn would have to pass the increase on down the line to the consumer, with each distributor adding an increment to his price because of his added costs and risks. Moreover, the record producers forecast that the variety of musical offerings would be restricted; that the quality of musical offerings would deteriorate; that composers, especially unknowns, would find fewer opportunities for having their works recorded; that record manufacturers would have to avoid risks on new and unusual compositions, reduce the number and length of selections, record fewer serious works, and rely more on the public domain for popular material."

This is identical with the record industry's current predictions. In testimony before the House Committee, Professor Glover also warned with elaborate statistical "proof" that this increase of 20¢ in record prices -- an increase of 7% from \$2.83 or 5% from \$3.98 -- would cause a sharp decline in sales and threaten the survival of countless record manufacturers, wholesalers and retailers 18/ (again all predictions repeated this year).

In the decade since those 1965 House Hearings, without any increase whatsoever in the 2 cent ceiling on payments to musical copyright holders, the record industry has increased its list price per song to consumers by more than 110% --not 5% or 7% but 110%:

1965 - Typical record sold: \$3.98 for 12 songs (\$0.332 per selection)

1975 - Typical record sold: \$6.98 for 10 songs (\$0.698 per selection)

Yet the RIAA has recently announced not a sharp decline in sales as a result of these constant price increases but an all-time high in record sales. There has been no discernible restriction in the variety of musical offerings, no deterioration in quality, no fewer opportunities for unknown composers, no lack of recordings of new, novel or lengthy compositions. There has been not a decline but a steady growth in the number, size and value of companies engaged in the record business and in the number and wages of their employees.

Not one of Professor Glover's predictions about the disasters which would follow a 7% increase in prices came true after a 110% increase in prices. On the contrary, as sales boomed to new heights each year, as monos gave way to stereo, and as stereos now give way to still higher-priced and more highly profitable tapes and cassettes, the entire level of industry compensation rates has been upgraded for everyone involved -- except those who created the music.

Compared with what they would have paid in 1964 for the same number of long-playing and single units, consumers last year paid an additional \$1 billion (one billion dollars)19/for their recorded music — but the creators of that music are still restricted to 2¢ or less per selection. As a result, our maximum share of the typical price per album has been cut by more than half: from 6% in 1965 to less than 3% in 1975.

The House in 1965 was willing to give us, in the form of a 2-1/2¢ ceiling, approximately 8% of that year's typical list price — a share which today even a 5¢ ceiling would not wholly restore. We believe that we should be compensated, like our European counterparts, at 8% of list price. But if the percentage approach is to be denied us in favor of a fixed cents-per-song figure, that figure should at least give us a ceiling comparable in its ratio to current prices to the level which the House was willing to give us a decade ago. Yet even a 5d ceiling would not wholly restore that fair share. For record companies to pocket their price increase of 110% per song while complaining about our request for a ceiling increase amounting to 2% of today's typical price would be laughable were it not so tragic for so many songwriters and composers.

One of the industry witnesses expressing alarm for the consumer in those earlier hearings was Mr. Clive Davis, then Vice President and General Manager of CBS Records, who warned that any increase in the \$3.79 price of a monaural long-playing record surely would harm the consumer if it were passed along, and surely force record companies out of business if it were not.20/ But in his 1974 autobiography, Mr. Davis proudly observed that on his own volition he had in 1967:

"raised the list price of the monaural pop record (from \$3.79) to \$4.79 (the stereo level) ... (to) give us another raise in album prices ... (and) a golden opportunity to move toward better profit margins.... The stereo record was no longer any more expensive to produce, though the 'myth' of its greater expense persisted."21/

All the other companics followed suit.

No inflationary cost increase required this rise, which the entire industry adopted, no concern for the consumer deterred it, and no composer shared in it. The sympathy for the consumer professed by the record industry -- which virtually alone among all the industries affected refused to pass on to the consumer the savings made possible by the repeal of the excise tax in 1965 -- will surely not fool all of the Congress all of the time.

Ability to Pay

The record companies -- led by CBS, RCA, MCA and Warners -- continue in the debate over this ceiling to plead poverty (as though they would dare to urge their utilities or trucking

companies or musicians to charge them less because of the record industry' financial state). But in truth the record industry, thanks in large part to the songwriters' appeal to youthful tastes, is one of the fas est-growing, multibillion dollar industries in this country today. Its estimated retail sales have risen 190% (from \$758 million a year in 1964 to \$2.017 billion in 1973 and \$2.2 billion in 1974), more than twice as much as our mechanical copyright royalty collections. Even on the basis of the RIAA's dubious "survey" of mechanical copyright royalty payments, they fell from 5.61% of retail sales receipts in 1964 to 3.82% in 1973; i.e. a 1/3 reduction in our share.22/

The record industry continues to prosper. A recent in-depth analysis of the industry estimates that its record and tape sales will reach \$3.4 billion by 1982.23/

In 1974, a recession year for most of the economy, the record industry — now larger than the motion picture industry and virtually as large as television broadcasting had a record year: \$2.2 billion in sales, an increase of almost 10%. Increases of that proportion or greater have been occurring annually since the RIAA's last appearance before this Committee to plead poverty, regardless of the state of the national economy. "I don't see a recession in the record business," said the President of CBS Records at the height of the recession last winter.24/ At the time he spoke, record prices were being increased again by another \$1.00 per album while sales continued to climb at most stores.25/

It is staggering to note that a record company's profit on the typical recording sold is far greater than that of the composer and publisher combined. According to the courtroom testimony of the President of Warner Bros., confirmed by a 1974 National Academy of Recording Arts and Sciences chart, of the \$6.97 or \$6.98 list price on a typical 8-track tape, 20-24¢ is before-tax income to the copyright holders at 2¢ per song, 32-72¢ is before-tax income to the performing artists, and 45-85¢ (62¢ according to the Warner estimate) is before-tax profit to the record company (gross income less advertising, overhead, etc.).26/

The record industry has tried to make much of the fact that increased record sales have increased aggregate payments to all musical copyright holders combined. Those total payments have of course increased, although not by the same proportion or amount as record sales. But the ceiling rate of payment has remained at an inequitable 2¢; and it is the rate that needs adjustment.

Were there only one musical copyright holder in the country, the increase in total royalty payments would be relevant. But in fact the far greater increase in the number of composers, lyricists and songwriters sharing in that enlarged royalty pool has substantially reduced — even before taking inflation into account — the average benefits per writer. It is thus the individual creator who suffers under a system that allows record companies and other music industry participants to increase their prices or rates at will while the rates paid to composers and publishers are frozen under an obsolescent ceiling.

Congress, after all, would not reject a Social Security cost-of-living increase merely because the aggregate paid to all Social Security beneficiaries had increased. A government employee GS-12 (first step), who was paid \$10,250 in 1965, has since then received 10 inflation adjustments with the approval of Congress and since October of last year has earned an annual salary of \$18,463. Clearly the fact that the aggregate of government employee salaries had been increasing did not blind Congress to the need to increase the individual employee's rate of earnings in order to keep up with inflation.

We have no doubt that inflation has posed a problem for the record industry as well. But that industry has been free to adjust its rate of return to cope with inflation — and has done so, as noted, by raising the typical record list price some 110% — while composers and authors have not. If a 2-1/2¢ cc ling was deemed reasonable by the House Judiciary Committee in 1966, on the basis of its examination of all the comparative ingenuity and contributions made by music creators and recorders, then 2-1/2¢ — now worth less than 1-1/2¢ — clearly cannot be reasonable today. Since then a rate of inflation unprecedented in this country, except in major wartime mobilization, has helped bring about two devaluations of the dollar, a series of economic stabilization measures and a host of adjusted prices and other rates of return both by statute and collective bargaining. Congress cannot fail to take this phenomenon into account.

CONCLUSION

That is why we plead with Congress to restore the level approved in 1965-67. To defend themselves against the ravages of inflation in the intervening years, the record companies, while enjoying large increases in aggregate income, have increased their rates (prices); record performers, producers and musicians have increased their rates (wages);

15.

and those lending money to the record and publishing industries have increased their rates (interest). Only the composers, songwriters, lyricists and music publishers of America have been forced to operate under the same ceiling rate which is steadily declining in purchasing power. Treating the creators of American music more fairly can only encourage the writing, recording and consumption of still more songs to the benefit of all concerned. Respectfully but urgently, therefore, we petition Congress to rectify this inequity, to let us at least ask for a fair royalty, by increasing the ceiling over negotiations to no less than 4¢ per selection.

FCOTNOTES

- 1. The record industry statement in favor of a "performance right" royalty asserts that a popular tape recoups its costs when sales reach 24,000 units.
- 2. The Recording Industry Association of America (RIAA) has long attempted unsuccessfully to divide us -writer from publisher -- by suggesting that the Congress require by law that writer-publisher contracts provide the lion's share to the writer. But as AGAC President Ervin Drake recently said: "we view publishers as our partners in a sense that is best expressed by the word 'symbiosis'. It is true that a publisher's work may not begin till our work is complete; but, in the large sense, our work is not complete until they exercise their functions properly as publishers." Through guarantees, advances, guidance and workshops the publisher encourages and assists the writer; and through demonstration records, samples, catalogues and a host of promotion activities, he keeps the writer's name before the public and industry all over the world. Today some writers are publishers, record producers and performers rolled into one, others have varying degrees of bargaining leverage, and no statute could possibly decide better than the parties how their mechanical copyright royalties should be divided.
- For the source of these and other figures, see the Summary Table and accompanying footnotes.
- 4. Id.
- 5. Id. A recent study by Robert R. Nathan Associates, Inc. (RRNA), details of which are in the attached tables, indicates that mechanical royalty payments during the last quarter of 1974 were below 2¢ for 54% of all selections, and 67.6% of all licenses. For some 23% of the licenses, a fee of less than 1.5¢ was paid. Obviously that will vary from song to song and record company to record company with no clearly predictable pattern. During the fourth quarter of fiscal 1974, for example, one record company paid a royalty of more than one cent per selection 98.3% of the time to one publisher but only 26.6% of the time to another publisher.

The 1969 Knight Report to the Senate Judiciary Subcommittee on Copyright by the Library of Congress Legislative Reference Service also concluded that "rate variations... do exist below the statutory maximum and do affect a sizeable portion of the copyrighted selections being recorded." One example of low-royalty recordings can be seen in the "Top 50 Hits of the 1940's" type of album heavily advertised on TV. Royalties on these selections average less than l¢ per record manufactured.

- 6. Register of Copyrights, Report to the House of Representatives, May 1958, Part 6, p. 58.
 - 7. RRNA Study.
 - 8. See Note 6.
 - 9. See Note 3. In terms of real (1965) dollars, this has been a 43% decline. (Beginning songwriters, requiring little capital investment to pursue that line of work are -- like the small farmer of an earlier generation --apparently undeterred at least in the initial stages by an inequitably low return for their efforts.)
- 10. CBS Records president Goddard Lieberson in a May 1974 address in London, and RCA Records executive Chet Atkins in April 1965 both emphasized that "the song's the thing" without which the best artists, musicians and recording equipment and technicians cannot be successful.
- 11. Congress feared that the Aeolian piano roll company was seeking a monopoly by making exclusive contracts with most of the important proprietors of musical copyrights. It thus provided in the Copyright Act of 1909 that, once the copyright owner of a nondramatic musical work had exercised his exclusive right to license the mechanical reproduction of that work to one recording or piano roll company (or record it himself), any or all other companies had the right to purchase a license to make similar use of that work. Without some statutory ceiling on the royalty to be charged, Congress then decided, such a right was unworkable; and after considerable deliberation that ceiling was fixed by law at 2¢ per selection for each record or piano roll manufactured. Talking machines were new, and record prices varied widely in a range far below their present level.
- 12. 1969 Report on Mechanical Royalty Rate on Sound Recordings by Mr. Edward Knight of the Library of Congress Legislative Reference Service.
- 13. See Note 6.
- 14. See Note 12.
- 15. For a single, of course, the maximum increase would be 3¢ per record (one selection on each side) over the level noted by the House a decade ago. Juke-box companies, which in the last year alone paid an increase of 25% in the cost of singles purchased wholesale from the record industry (Statement of Fred Collins, Jr., President, Music Operators of America, Billboard, July 19, 1975, p. 3), are thus unlikely to feel any noticeable economic impact from even this maximum three penny increase.

- 16. See Note 3.
- 17. S. Rep't 93-983, 1974, p. 148. (Emphasis added.)
- 18. See Prof. Glover's testimony, for example, on pp. 819, 824, 889, 901, 822, 816, 777, 810 and 773 of the June 1965 Hearings before the House Judiciary Subcommittee on Copyright. Prof. Glover also warned that increasing the mechanical rate ceiling might require a reduction in the number of songs per album. The ceiling has not been raised but the reduction (from 12 to 10) occurred anyway, thereby increasing the record company's price per song and decreasing the composer's royalty per album.
- 19. The precise figure is \$998,400,000, calculated as follows:

		19	64*	i	197	4**	
	ī	2	_ 3	4	5	- 6 At 1964	7
	Sales	Units	Average Price(1;2)	Actual Sales	Units	Average Price (5x3)	Difference (4-6)
LPs Singles	\$515M 175	192M 226	\$2.68 .77	\$2,006.3M 194	389.9M 204	\$1,044.8M 157.1	\$961.5M 36.9
				1		Total:	\$998.4M

*Billboard 1967-68 International Record Survey, pp. 10-11
**Record World, June 7, 1975, p. 3.

While much of the analysis contained in this statement relies necessarily on published list prices, the age-old prevalence of discounts at the retail level does not alter the conclusions drawn therefrom, inasmuch as it is the relative change in prices over the last 10 years that matters and there is no evidence that the ratio of realized actual retail prices to list prices has declined. On the contrary, there is reason to believe that they have risen in the last ten years, thus signifying an even larger effective price per selection increase than the 110% cited in the text.

- 20. See Mr. Davis's testimony, pp. 515-516, March 21, 1967 Senate Judiciary Subcommittee Hearings.
- 21. CLIVE, INSIDE THE RECORD BUSINESS by Clive Davis with James Willwerth, William Morrow & Company, Inc., 1974. The \$3.79 and \$4.79 price references differ from the \$3.98 and \$4.98 figures noted above by virtue of the then applicable excise tax. When this tax was repealed, however, the industry kept the price at the same level and pocketed the 19¢ per record instead of passing this savings on to the consumer.
- 22. See Note 3.

- 23. Billboard, March 9, 1974, p. 4.
- 24. Billboard, February 1, 1975, p. 3; See also Billboard, August 17, 1974, p. 8: "... the record tape industry is recession-proof." See also New York Times, July 23, 1975: "even in a recession, there are huge profits to be made in recorded music..." 'There's nothing like the record business,' said Marshall Blonstein, a vice president of Ode Records:

'People talk about big hits in the movies...
You know how much it costs to produce a
record? - about \$40,000, and you can make
millions.'"

- 25. Billboard, April 5, 1975, p. 4.
- 26. Billboard, July 6, 1974, p. 4. See Transcript of testimony of Joseph B. Smith in U.S. v. Taxe et al.

 In truth even this understates the record company's profit and overstates the music composers' and publishers' income because the current prevailing tape price is \$7.98, not \$6.98, and, as shown above, the royalty rate of the majority of selections is below the 2¢ ceiling. The New York Times also estimates a much higher gross profit margin. Op. cit. supra, Note 24.

Table 1. Consumer Price Index 1965-75 and Projected January 1976

Year	Consumer Price Index (1967 = 100)
1965	94.5
.1966	97.2
1967	100.0
1968	104.2
1969	109.8
1970	116.3
1971	121.3
1972	125.3
1973	133.1
1974	147.7
July 1975	162.3
January 1976 ^{<u>a</u>/}	168.5

a/ Projected.

Source: Monthly Labor Review, September 1975.

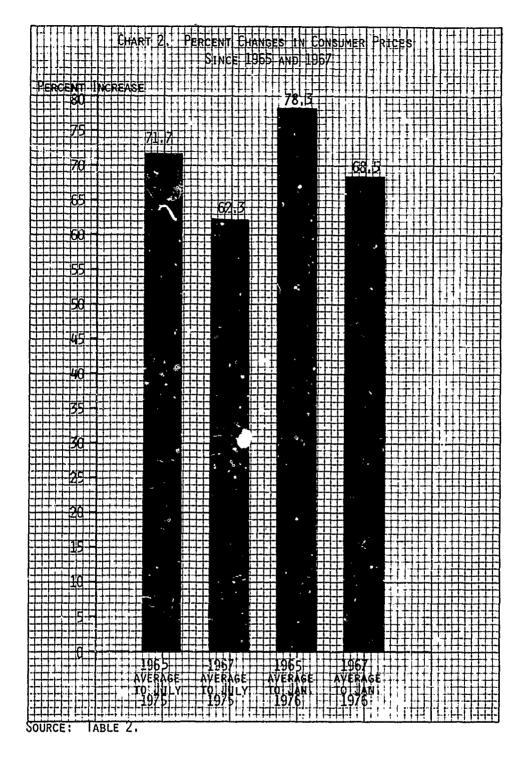


Table 2. Percent Changes in Consumer Prices Since 1965 and 1967

Period	Percent change
1965 to July 1975	+71.7
1965 to January 1976	+78.3
1967 to July 1975	+62.3
1967 to January 1976	+68.5

Source: Table 1.

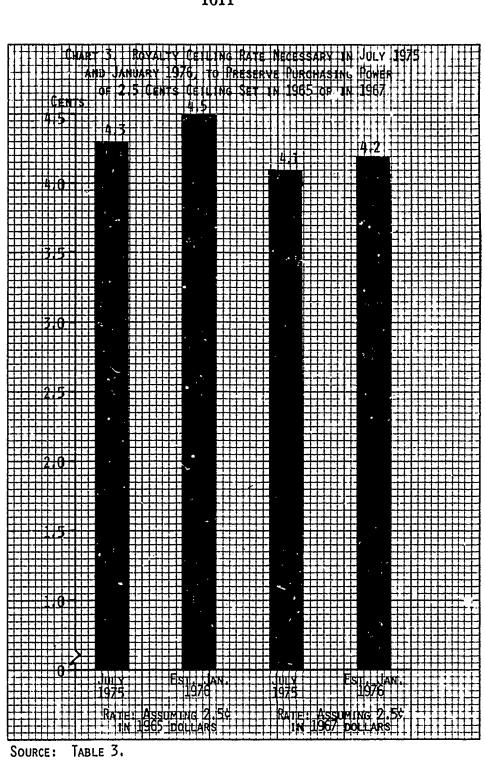


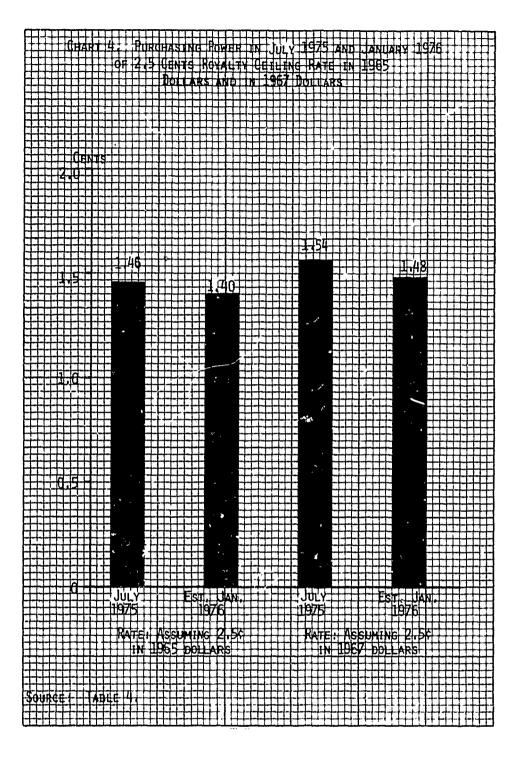
TABLE 3. Source:

Table 3. Royalty Ceiling Rate Necessary in July 1975 and January 1976, to Preserve Purchasing Power of 2.5 Cents Ceiling Set in 1965 or in 1967

	2.5 cent ra	te set in
Date	1965	1967
July 1975	4.3¢	4.1¢
January 1976 ^{<u>a</u>/}	4.5¢	4.2¢

a/ Projected.

Source: Calculated from table 1.



K-E 10 X 10 TO THE INCH 46 0703 KUPPLL & COST CO.

Table 4. Purchasing Power in July 1975 and January 1976 of 2.5 Cents Royalty Ceiling Rate in 1965 dollars and in 1967 Dollars

`	2.5 cent r	ate set in
Date	1965	1967
July 1975	1.46¢	1.54¢
January 1976 <u>a</u> /	1.40¢	1.48¢

a/ Projected.
Source: Calculated from table 1.



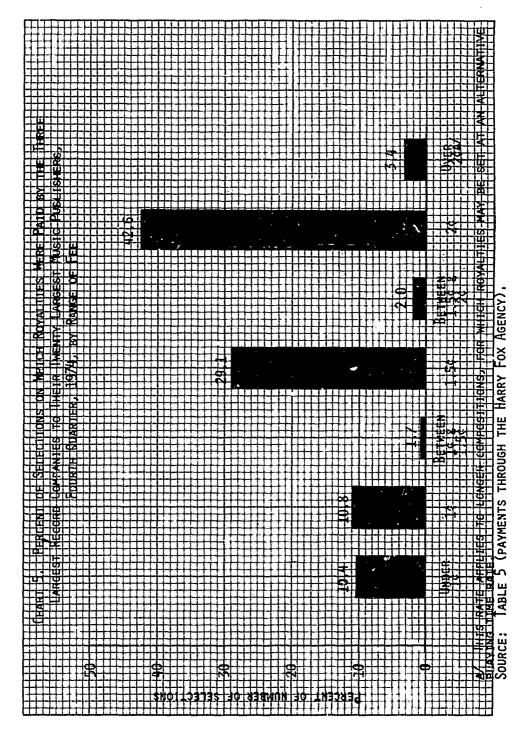


Table 5. Number and Percent of Selections on Which Royalties Were Paid by the Three Largest Record Companies to Their Twenty Largest Music Publishers, Fourth Quarter of 1974, by Range of Fee

(Number in millions)

This rate applies to longer compositions, for which royalties may be set at an $\frac{a}{a}$. This rate applies to longer alternative playing time rate. Source:

Survey of payments through the Harry Fox Agency, Robert R. Nathan Associates, described in detail on next page. These three record companies account for 41 percent of the total payments through the Harry Fox Agency. Table 5 (continued)

Source:

The majority of royalty payments from record companies to music publishers are made through the Harry Fox Agency. Robert R. Nathan Associates carried out a survey of the records of these payments for the fourth quarter of 1974. A similar study was made for the second quarter of 1965. The results of this earlier survey were presented on February 25, 1966 in the Second Supplementary Statement of Robert R. Nathan on behalf of the Music Publishers' Protective Association (now the National Music Publishers' Association), before the subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, 89th Congress, Second Session.

The three largest record companies were included in both of the tabulated samples. They accounted for 41 percent of the payments through the Harry Fox Agency in the last quarter of 1974. For each of these three record companies the twenty largest music publishers in terms of royalty payments were determined in the most recent survey; those twenty differ for the various record companies. A total of 47 publishers were included. In the 1965 survey six publishers per record company were analyzed. a much larger sample has been taken in 1974. ever, to provide direct comparability with the 1965 results, tabulations have also been made for the fourth quarter of 1974 for a subsample consisting of the six largest music publishers for each of the three largest record companies. Total payments for the group analyzed in the fourth quarter of 1974 in the full sample of 20 publishers per record company were \$2.34 million, covering the sale of 144.6 million selections.

Table 6. Amount and Percent of Total Royalty Payments Paid by the Three Largest Record Companies to Their Twenty Largest Music Publishers, Fourth Quarter of 1974, by Range of Fee

_
S
O.
~
ď
H
_
М.
0
Ti.
•
tr_r
44
oĘ
v
ທ
Ľ.
യ
C
ä
an
ທ
ä
,
O
ဝ္ဂ
נב
-
~
'n
_
LL
7.
C
=
_
\overline{a}
U
~
=
7
~

1			Fee	Fee range in cents	n cents			
•	Under 1¢	1¢	Between 1¢ & 1.5¢	1.5¢	Between 1.5¢ & 2¢	2¢	Over 2¢a/	Total
Amount of payments	70.3	70.3 155.8	31.1	630.9	51.1	1,231.9	165.5	2,336.5
Percent of payments	3.0	6.7	1.3	27.0	2.2	52.7	7.1	100.0
Cumulative percent of payments	3.0	9.7	11.0	38.0	40.2	92.9	92.9 100.0	1

a/ This rate applies to longer compositions, for which royalties may be set at an alternative playing time rate. Source: Survey of payments through the Harry Fox Agency, Robert R. Nathan Associates

Table 7. Number and Percent of Licenses on Which Royalties Were Paid by the Three Largest Record Companies to Their Twenty Largest Music Publishers, Fourth Quarter, 1974. by Range of Fee

			Fee r	Fee range in cents	cents			
	Under 1¢	1¢	Between 1¢ & 1.5¢	1.5¢	Between 1.5¢ & 2¢	5¢	0ver 2¢ <u>a</u> /	Total
Number of licenses	4,632	5,841	2,622	23,331	1,916	17,293	1,143	56,778
Percent of licenses	8.2	10.3	4.6	41.1	3.4	30.4	2.0	100.0
Cumulative percent of licenses	8.2	18.5	23.1	64.2	9.79	0.86	98.0 100.0	1

Source: Survey of payments through the Harry Fox Agency, Robert R. Nathan Associates. This rate pplies to longer compositions, for which royalties may be set at an a/ This rate pplies to longeralternative playing time rate.

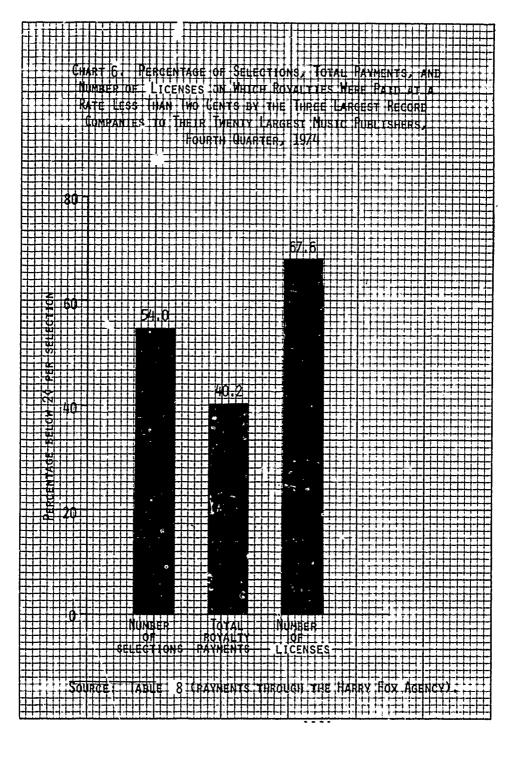
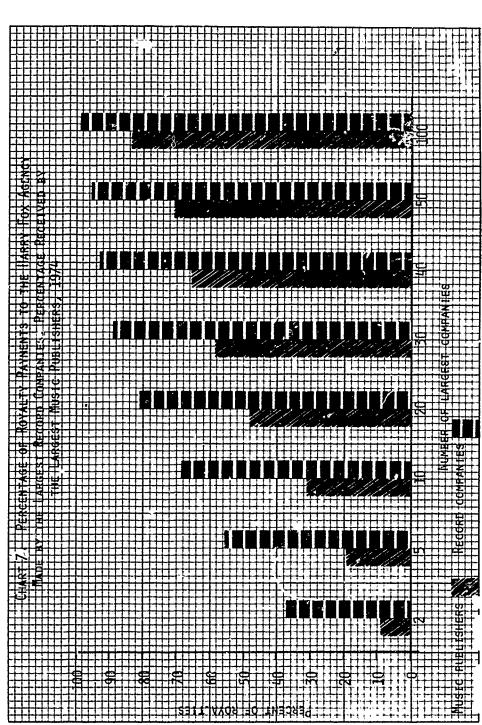


Table 8. Summary: Percentage of Selections, Total Payments, and Number of Licenses on Which Royalties Were Paid by the Three Largest Record Companies to their Twenty Largest Music Publishers at a Rate Less Than Two Cents Per Selection

Item	Percentage below two cents per selection
Number of selections	54.0
Total royalty payments	40.2
Number of licenses	67.6

Source: Tables 5, 6 and 7.

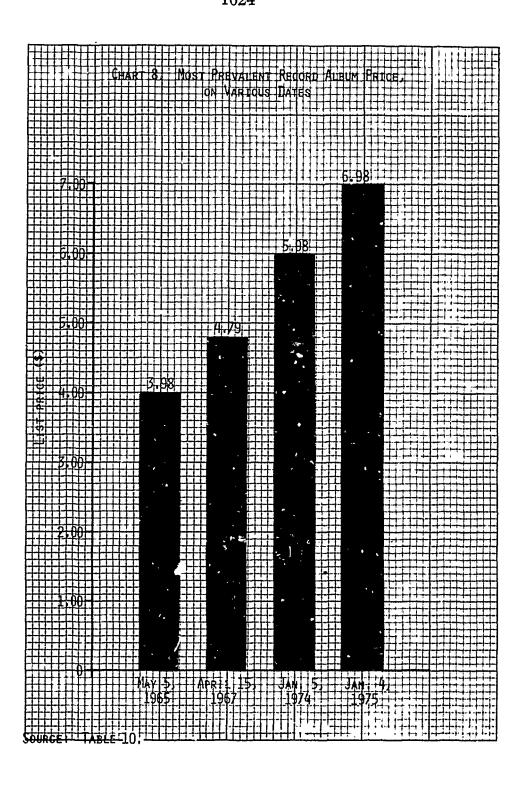


Source: TABLE 9.

Table 9. Percentage of Royalty Payments to the Harry Fox Agency Made by the Largest Record Companies, and Percentage Received from the Harry Fox Agency by the Largest Music Publishers, 1974

Percentage of total royalties · paid by largest record companies	Percentage of total royalties received by largest publishers
. 37.4	8.8
55.3	19.5
68.3	31.3
81.2	48.1
89.2	58.4
93.2	65.4
95.4	70.6
98.7	83.4
	total royalties paid by largest record companies 37.4 55.3 68.3 81.2 89.2 93.2 95.4

Source: Harry Fox Agency, Cash Deposits Journal Summary
Report, 1974 (percentages computed). The majority
of royalty payments from record companies to music
publishers are made through the Harry Fox Agency.



K-E 10 X 10 TO THE INCH 46 0703

TX 10 INCHES

KEUPEL & ESSER CO.

Table 10. Most Prevalent Record Album Price, on Various Dates

Date	Most prevalent record album price
May 5, 1965	\$3.9 ⁸
April 15, 1967	4.79
January 5, 1974	5.98
January 4, 1975	6.98

Source: Billboard charts of best selling albums, dates listed; prices are for monaural records for May 5, 1965, and stereophonic for other dates, since these were the most common categories on the various dates.

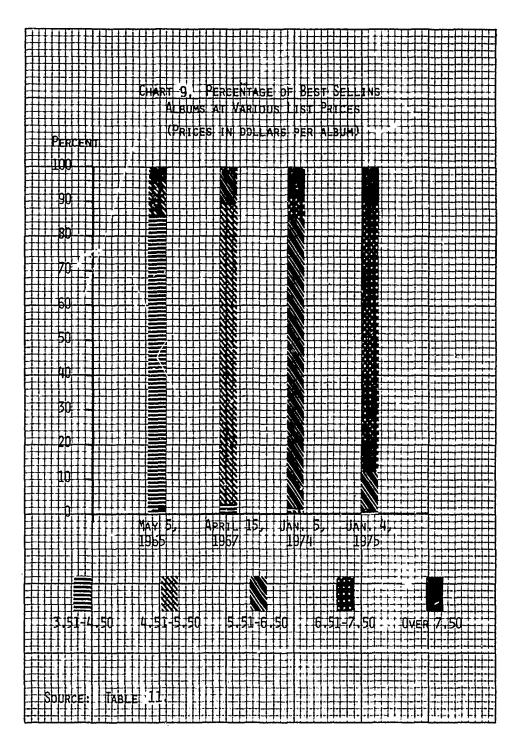
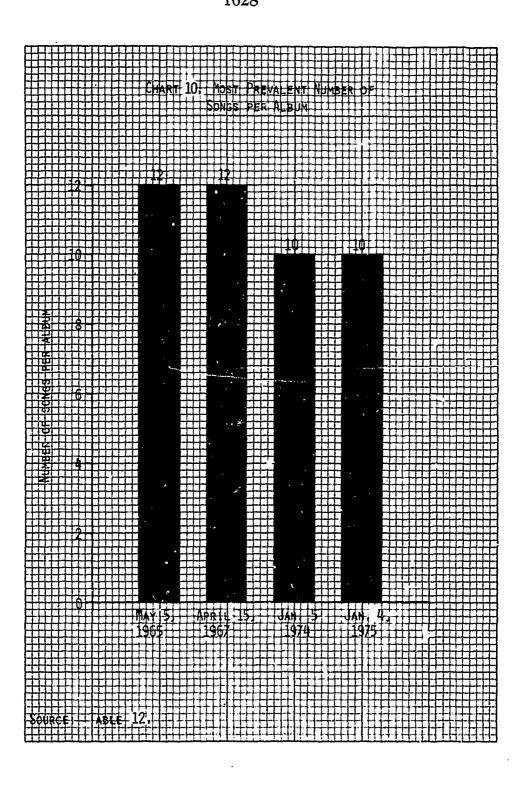


Table 11. Number and Percentage of Best Selling Albums at Various List Prices

Price range	5/2/65	/65	4/15/67	19/9	1/5	1/5/74	1/1	1/4/75 🖈
(dollars per album)		Number Percent Number Percent Number Percent	Number	Percent	Number	Percent	Number	Percent
	•							
3.51-4.50	128	85.3	4	2.7	0	0.0	Ħ	0.5
4.51-5.50	17	11.3	130	86.7	r-t	0.5	0	. 0.0
5.51-6.50	ស	3.3	13	8.7	170	85.0	23	11.5
6.51-7.50	0	0.0	m	2.0	12	0.9	157	78.5
Over 7.50	0	0.0	0	0.0	17	8.5	19	9.5
						×		
Total	150	100.0	150	100.0	200	100.0	200	100.0

Note: Percentages may not add to total due to rounding. Source: Billboard, dates listed.

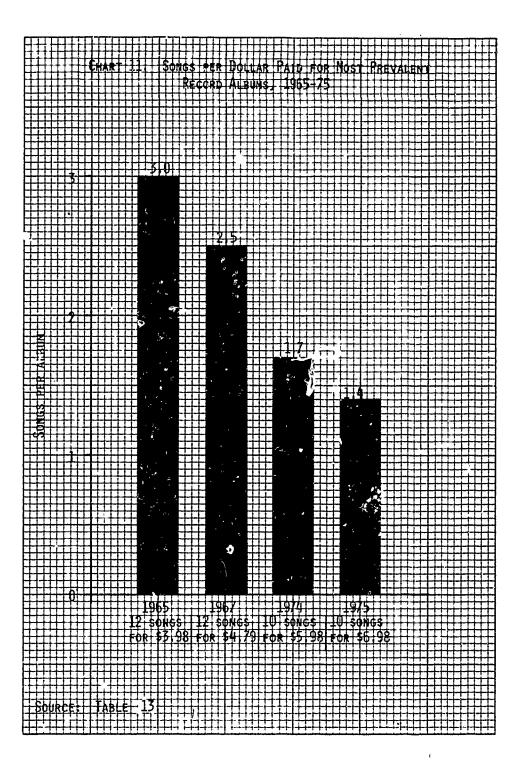


KE TATIO INCHES AMERICA.

Table 12. Most Prevalent Number of Songs per Album from <u>Billboard</u> Chart of Best Selling Albums, 1965-75

Date	Most prevalent number of songs per album
,	
May 5, 1965	12
April 15, 1967	12
February 24, 1968	12
May 5, 1969	11
January 6, 1973	10
January 5, 1974	10
January 4, 1975	10

Source: An analysis by National Music Fublishers' Association of the best-selling albums listed in <u>Billboard</u> on dates cited.

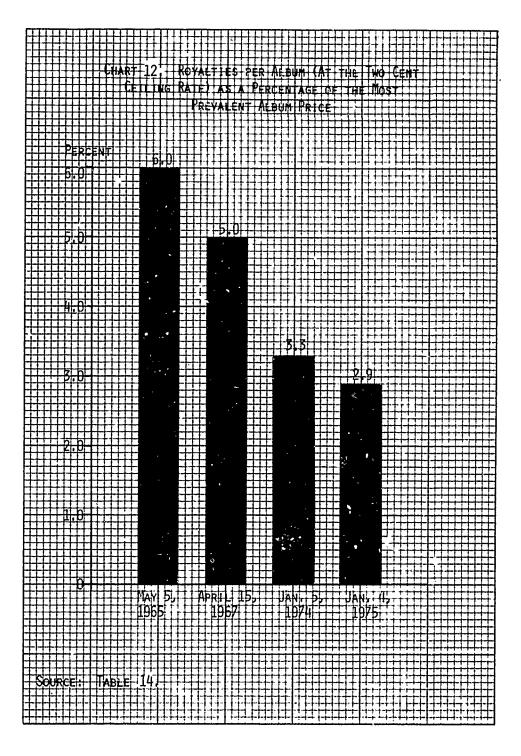


KAE 10 X 10 TO THE INCH 46 0703
REUFFEL & ESSEN CO

Table 13. Songs per Dollar Paid for Most Prevalent Record Albums, 1965-75

Date	Songs on most prevalent album	Price of most prevalent album	Songs per dollar
1965	12	\$3.98	3.0
1967	12	4.79	2.5
1974	10	5.98	1.7
1975	10	6.98	1.4

Source: Tables 10 and 12.



K-E 10 X 10 TO THE INCH 46 0703 KEUPPEL & ESSER CO JAN 18 11 4

Table 14. Royalties Per Album (At the Two Cent Ceiling Rate) as a Percentage of the Most Prevalent Album Price

Date	lent	Royalty per album at the 2¢ ceiling rate	Royalty per album as percentage of most pre- valent price per album
	do	ollars	
May 5, 1965	3.98	0.24	6.0
April 15, 1967	4.79	0.24	5.0
February 24, 1968	4.79	0.24	5.0
May 5, 1969	4.98	0.22	4.4
January 6, 1973	5.98	0.20	3.3
January 5, 1974	5.98	0.20	3.3
January 4, 1975	6.98	0.20	2.9
	J		

Source: Calculated from tables 10 and 12.

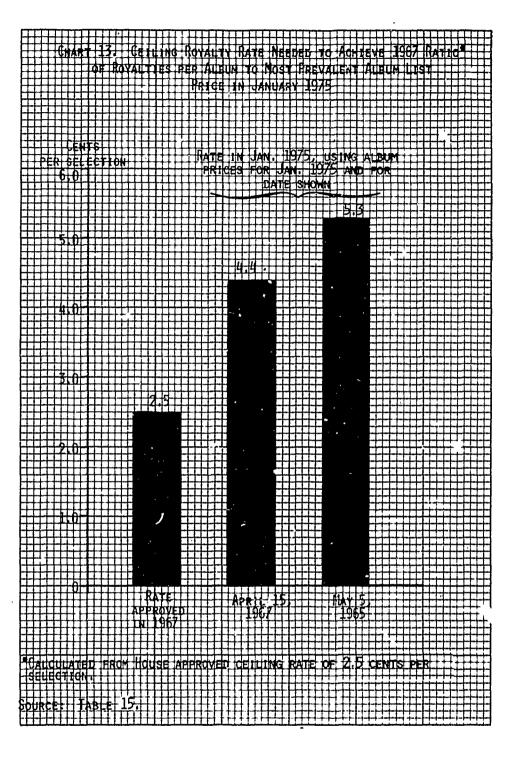


Table 15. Ceiling Royalty Rate Needed in January 1975 and Projected Rate Needed in January 1976 to Achieve 1967 Ratio of Royalties Per Album to Most Prevalent Record Album List Price

(Royalty measured in cents per selection)

Date	Royalty necessary to restore level approved in 1967 based on prices for date shown		
	April 15, 1967	May 5, 1965	
January 1975	4.4	5.3	
January 1976 ^b /	5.1	6.1	

a/ Calculated from House approved ceiling rate of 2.5 cents per selection.

Source: Calculated from data in tables 10 and 12.

b/ Projecting the January 1974-January 1975 trend of most prevalent record prices forward to January 1976.

K-M 10 X 10 TO THE INCH 46 0703

Table 16. Record and Tape Sales, 1964-74

Year	Total sales (millions of \$)	Percent of total sales in records	Percent of total sales in tapes
1964	758	100,0	0.0
1965	862	100.0	0.0
1966	959	100.0	0.0
1967	1,173	89.6	10.4
1968	1,358	82.8	17.2
1969	1,586	73.8	26.2
1970	1,660	, 71.2	28.8
1971	1,744	71.7	28.3
1972	1,918	72.1.	27.9
1973	2,017	71.2	28.8
1974	2,200	70.5	29.5

Source: Annual Billboard surveys; Record World, June 7, 1975

Sources - Summary Table

- (1) Consumer Price Index (CPI) r July 1975, U.S. Department of Labor.
- The value for 1975 was obtained by multiplying 2.5¢ by 0.582, the ratio of the CPI for 1965 to the CPI for July 1975.
- (3) The value for 1975 was obtained by multiplying 2.5¢ by 1.717, the ratio of the CPI for July 1975 to the CPI for 1965.
- r figure, survey by Robert R. Nathan Associates For current do of royalty payments ade through the Harry Fox Agency in the fourth quarter of 1974. This survey covered the sale of 145 million recorded songs. The 1965 figure is based on a similar survey for the second quarter of 1965, which covered 32 million songs. The 1975 survey included the twenty largest publishers for each of the three largest record companies. The value for 1975 in 1965 dollars was obtained by multiplying 1.62¢ by 0.612, the ratio of the average CPI for the second quarter of 1965 to the average CPI for the fourth quarter of 1974.
- Contract scale of American Federation of Musicians (Local 802, New York).
- (6) As reported by the Federal Pay Advisory Commission.
- (7) Prices of the top 200 best selling albums as reported in Billboard, the industry trade journal, for May 5, 1965, and January 4, 1975. It should be noted that the price of a typical tape in January 1975 was \$7.98. Tapes account for about 30 percent of the total sales of all recordings, thus the average price per recording is more than \$7.25.
- Based on a count of songs on the best selling albums listed in Billboard.
- (9) Column (7) divided by column (8).
- 2.5¢ divided by column (9). (10)
- (11) Values are for 1964 and 1974. For 1974: Record World, June 7, 1975, page 3. For 1964: Billboard 1972-73 International Music-Record Directory, page 9.
- Values are for 1964 and 1974. As stated by the Recording Industry Association of America in material submitted to Congress. RIAA also alleges that royalty payments totalled \$77.1 million in 1973. However, it appears that the RIAA data overstate total
- royalty payments for the following reasons:

 a) In the 1974-75 International Music-Record Directory, Billboard made the following estimates for 1973:
 - 292 million record albums and tapes sold
 - 193 million single records sold
- With 10 songs per album or tape, 2 songs per single record, and a maximum royalty of 2¢ per song:
 - \$58.4 million maximum royalties on albums and tapes \$ 7.7 million maximum royalties on single records \$68.1 million maximum royalties

Thus even if all royalties were paid at the ceiling rate (which. they are not, as shown in (4)), total payments could not have

amounted to more than \$66.1 million in 1973, or \$11 million less than the RIAA figure.

- b) In their news release about 1974 sales (Record World, June 7, 1975) the RIAA indicated that the total dollar volume of recording sales rose by more than 9 percent in 1974, but that the number of units sold decreased as a result of the sharp rise in record prices. Because royalties depend on the number of units sold, not on the total dollar volume, total royalty payments would have fallen in 1974, not risen by 8.3 percent as alleged by the RIAA. The data for 1974 show the obvious fallacy in the RIAA argument that composers and publishers have benefitted greatly from the increase in the dollar volume of record and tape sales. Much of this increase, especially in recent years, has been the result of higher prices, not of an increase in the number of units sold.
 - (13) Combined author, composer, and lyricist dues-paying, work-published memberships of American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music Incorporated (BMI), on-June 30, 1965 and June 24, 1975.
 - (14) For the values in current dollars, column (11) multiplied by column (12) divided by column (13). The value for 1975 in 1965 dollars was obtained by multiplying \$2,362 by 0.582, as in (2).
 - (15) For 2.5¢ in 1965, from column (10). For 4.0¢ in 1975, obtained by multiplying 4¢ by 10 (songs per album), and dividing by \$6.98.
 - (16) For 4.0¢ in 1975, obtained by multiplying 4¢ by 0.582, as in (2).
 - (17) 15¢ divided by \$6.98.
 - (18) 15¢ divided by \$3.00 (\$6.98 minus \$3.98).

ROBERT R. NATHAN ASSOCIATES, INC., Washington, D.C., October 24, 1975.

Congressman Robert Kastenmeier, Rayburn House Office Building, Washington, D.C.

Dear Congressman Kastenmeier: I testified on September 11, 1975, before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary on behalf of the National Music Publishers' Association. During this testimony Congressman Wiggins asked for my evaluation of Exhibit E on page 13 of the summary statement of John D. Glover on behalf of the Recording Industry Association of America (RIAA). This exhibit is titled "Mechanical royalties paid per released tune outpace inflation and median family income, 1963 vs. 1972." I had not seen this exhibit prior to the hearing of September 11, and thus I was not able to provide an evaluation of it at that time.

I have now had an opportunity to analyze this exhibit and the supporting material in the full statement by John D. Glover. I believe that this exhibit is very misleading. There are two general reasons for my belief:

(A) Questions about the exhibit itself

(B) Omission of important factors relevant to the Subcommittee's consideration of this matter.

With regard to (A), in order to calculate mechanical royalties paid per re-leased tune, obviously it is necessary to have data on total royalty payments and on the number of released tunes. We do not have sufficient data to estimate the total amount of royalties actually paid. However, we believe that the estimates presented by Mr. Glover overstate the level of royalty payments in recent years. On page 43 of his statement Mr. Glover estimates that total mechanical royalties paid by U.S. record makers were \$78.2 million in 1972. But even if all royalties were paid at the 2¢ ceiling rate (which they are not, as shown conclusively in the joint statement of the American Guild of Authors and Composers (AGAC) and the National Music Publishers Association (NMPA), and confirmed by data in Mr. Glover's analysis), total payments could not have amounted to more than \$62.7 million in 1972, which is \$15.5 million less than Mr. Glover's estimate.1

Regarding the number of releases, Mr. Glover cites Billboard as the source, but no dates are given, thus I have been unable to examine the validity of his statistics on this.

It appears that Mr. Glover may have purposely selected 1963 and 1972 as the years for comparison in order to be able to draw the conclusions he desired. I ccepting for the moment Mr. Glover's data on total royalty payments, the conclusions differ dramatically if more relevant points of comparison are used. For example, over the last three years for which data are available: Consumer Price Index has risen by 30 percent.2 Median family income has risen by 25 percent.3 Record prices have risen by 28 percent.4 Record sales have risen by 26 percent.5

Record companies' profits have risen by 42 percent (by the industry's own

data, on page 157 of Mr. Glover's statement).

Royalties have risen by only 2.6 percent (based on the data on page 54 of Mr. Glover's statement). If the number of releases has remained approximately constant, then royalties per release would also have risen by only 2-3 percent.

It is especially misleading to make statements about inflation using data no more recent than 1972. In the last 10 years the Consumer Price Index has risen by 73 percent, nearly twice the 37 percent shown by Mr. Glover in Exhibit E.

¹ In the 1973-74 International Music-Record Directory, Billboard made the following estimates for 1972, from RIAA date: 277 million record albums and tapes sold, 183 million single records sold.

single records sold.

With 10 songs per album or tape, 2 songs per single record, and a maximum royalty of 2¢ per song; \$55.4 million maximum royalties on albums and tapes; \$7.3 million maximum royalties on single records; \$62.7 million maximum royalties.

As reported by the Bureau of Labor Statistics.

U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Series P-60. No. 99. July 1975. table 2, p. 7.

Of the Billboard list-of 200 best selling albums for Jan. 15, 1972, 81 were listed at \$4.98, 110 at \$5.98, and 9 at \$6.98, yielding an averdage \$5.62. On the Billboard list for Jan. 4, 1975 1 was listed at \$3.98, 23 at \$5.98, 157 at \$6.98. 5 at \$7.98, 1 at \$8.95, 5 at \$9.98, 6 at \$11.98, and 2 at \$12.98, yielding an average of \$7.17.

From \$1,744 million in 1971 to \$2,200 in 1974, as reported on p. 6 of the Billboard 1975-76 International Music-Record Directory.

In fact, Mr. Glover admits that his estimates of royalties per tune are not accurate (page 41). He believes that his estimate of the trend is accurate, but obviously one cannot obtain an accurate estimate of a trend from two inaccurate

estimates of the level of royalties per tune.

It is very important to note that in his calculation of royalties per release Mr. Glover includes royalties paid in 1972 on tapes released (page 43) but does not include the number of tapes released This obviously and substantially overstates royalties per release in 1972. It also overstates the trend in royalties per release, because tapes were not available in 1963 but they accounted for 28 percent of total record and tape sales in 1972. That is a big factor in rendering the Glover figures invalid.

As eloquently stated by composers Marvin Hamlisch and Eubie Blake in their testimony before the Subcommittee, even the royalties paid on a best seller have been and continue to be woefully inadequate, whether the song be "I'm Just Wild about Harry" in 1921 or "The Way We Were" in 1971.

With regard to (B), Mr. Glover omitted the following important facts, which

should be taken into account by the Subcommittee:

(1) In terms of purchasing power, royalties per songwriter have fallen by more than 40 percent in the last ten years (as indicated in column 14 of the summary table in the statement of AGAC and NMPA).

(2) The total dollar volume of record sales has nearly tripled in the last ten years (as indicated in column 11 of the summary table in the statement of

AGAC and NMPA).

(3) List price per song on a typical album has risen by 112 percent in the last ten years (as indicated in column) of the summary table in the statement of AGAC and NMPA). The actual retail price per song on a typical album has risen by 142 percent in the last ten years. The price per song on a typical album which is charged to distributors by record companies has risen by 136 percent in the last ten years. Thus, however one looks at it, record prices have risen sharply. During this time, the mechanical royalty ceiling has remained fixed at 2¢, and the average royalty actually paid has risen only 7 percent, from 1.51\$ to 1.62¢, (as indicated in column 4 of the summary table in the statement of NMPA and AGAC).

Sincerely,

ROBERT R. NATHAN. President.

NOVEMBER 6, 1975.

SUPPLEMENTARY STATEMENT OF THE AMERICAN GUILD OF AUTHORS AND COMPOSERS AND THE NATIONAL MUSIC PUBLISHERS ASSOCIATION

SUBMITTED TO THE HOUSE JUDICIARY SUBCOMMITTEE ON COPYRIGHT WITH REGARD TO SEC. 115 OF H.R. 2223

As promised during the hearing on September 11, 1975, we have reviewed the "report" on Sec. 115 of H.R. 2223 submitted on that date by John D. Glover on behalf of the Recording Industry Association of America (RIAA). With all due respect to Dr. Glover and his employers, we submit that this "report" provides no basis for a meaningful analysis of the economic issues inherent in the Sec. 115 dispute.

1. The use of irrelevant data

A. Dr. Glover attempts to use 1909 as a base year for those calculations that thereby favor his employers. This borders on the absurd. No reliable data for 1909, consistent with either 1975 statistical information or with the modern structure of the music industry, can be derived from available sources. Were we to follow that path, we would note that a 12 cent ceiling would be necessary today to restore the purchasing power of a 2 cent ceiling in 1909.

on p. 53 of the 1965 statement of John D. Glover on behalf of the Record Industry Association of America, it was indicated that an album listed at \$3.98 typically was sold at retail for \$2.83, or 24¢ per soig on the prevailing 12-song album. On p. 65 of the 1975 statement of John D. Glover, it is stated that an album listed at \$6.98 typically sold at retail for \$5.77, or 58¢ per song on the prevailing 10-song album.

On p. 59 of the 1965 statement of John D. Glover on behalf of the Record Industry Association of America, it was indicated that an album listed at \$3.98 typically was sold by the record company to the distributor for \$1.70, or 14¢ per song on the prevailing 12-song album. On p. 65 of the 1975 statement of John D. Glover, it is stated that an album listed at \$6.98 typically is sold by the record company to the distributor for \$3.33 or 33¢ per song on the prevailing 10-song album.

B. Dr. Glover also uses supposed 1909 statistics to support his claim that the price per recorded tune is down and the copyright owner's share up.1 The more relevant question is what happened to these admittedly important yardsticks as a result of the traumatic changes of the last 10 years since the House passed the 2.5 cent ceiling. We acknowledge the undue conservatism of our previous statement (in column 9 of our "summary table") that the price per song on a typical album had risen by 112 percent over the last 10 years. That referred to list prices. According to Dr. Glovers' own data, in the last 10 years the actual retail price per song on a typical album has risen by 142 percent, and the price charged by record companies to distributors has risen by 136 percent.2

C. Dr. Glover attempts to conceal the low level of mechanical royalty rates by including the income of composers and publishers from other sources, such as performance fees and foreign royalties. He failed to tell the Subcommittee how these figures were relevant, how he arrived at his estimates or why some

of his mathematics were garbled.4

D. Dr. Glover attempts to plead poverty for the RIAA by citing questionable figures (see Item 5D, page 9) about recordings that fail to make a profit. Even if his data were accurate, it would be irrelevant in view of the record industry's stated policy of recovering through a few best selling records their losses on any others. In fact, there is limited overall risk in the record industry, as indicated by the steady uptrend of sales year after year, even in periods of recession. There are a lot more impoverished song writers, and a lot more songs which fail to be recorded at all, no matter how much time and effort their authors and publishers invest in them.

2. The use of unreliable data

Dr. Glover attempts to base most of his analysis on a "survey" of record companies conducted by his own company, the Cambridge Research Institute. Yet the letter accompanying the questionnaire was an open invitation to sucmit biased information." It is thus small wonder that he concludes that total mechanical royalty profits for 1973 were \$77-82 million,8 despite the fact thateven if all royalties were paid at the ceiling rate (which his own report confirms not to be the case)—total payments for 1973 according to the RIAA's own data at the time could not have exceeded \$66.1 million.9

3. The use of unsubstantiated assumptions

A. Dr. Glover's key allegation—that an increase in the royalty ceiling from 2 cents to 3 cents would automatically lead to an increase in royalty payments of \$47 million 10—is based on the assumption that all royalty rates would rise by 50 percent or even more. There is absolutely no basis for assuming that all payments would rise proportionately with any change in the ceiling level, or

by the record company to the distributor for \$3.33, or 33 cents per song on the prevailing 10 song album.

³ Performance fees, it should be added, do not depend on the existence of recordings. While performances on local radio today are almost invariably from recordings, if there were no recordings, these performances would either be live or from the electrical transcriptions which in the 1930's and 1940's were the mechanical means by which radio stations broadcast music.

⁴ On p. 39 of his statement, the percentage increase in the last two rows of the fourth column is overstated by 100 percent. The corresponding references on pp. 40 and 41 are also in error.

column is overstated by 100 percent. The corresponding references on pp. 40 and 41 are also in error.

5 Pp. 20-21, 73-77, 162.

6 On a popular album selling 1 million copies, the record company's profit is \$1.06 million, according to the data on p. 162 of Mr. Glover's statement.

7 Record companies were told in advance that the very purpose of the survey was to "illustrate the severe impact on the record industry of raising mechanical fees." P. 128.

8 P. 39.

¹ P. 6 of the Glover statement of 1975.

² On p. 53 of the 1965 statement of John D. Glover on behalf of the RIAA it was indicated that an aboun listed at \$3.98 typically was sold at retail for \$2.83, or 24 cents per song on the prevailing 12 song album; on p. 65 of Dr. Glover's 1975 statement it is stated that an album listed at \$6.98 typically is sold at retail for \$5.77, or 58 cents per song on the prevailing 10 song album. On p. 59 of Dr. Glover's 1965 statement it was indicated that an album listed at \$3.98 typically was sold by the record company to the distributor for \$1.70, or 14 cents per song on the prevailing 12 song album; on p. 65 of Dr. Glover's 1975 statement it is stated that an album listed at \$6.98 typically is sold by the record company to the distributor for \$3.33, or 33 cents per song on the prevailing 10 song album.

In the 1974-75 International Music-Record Directory, Billhoard reported that the RIAA made the following estimates for 1973: 292 million record albums and tapes sold; 193 million single records sold; with 10 songs per album or tape, 2 songs per single record, and a maximum royalty of 2 cents per song: \$58.4 million maximum royalties on albums and tapes; \$7.7 million maximum royalties on single records; \$66.1 million maximum royalties. mum royalties.
10 Pp. 15-17 et seq.

that all royalty licenses would increase at all, or that even those royalties now at the 2 cent ceiling would all increase by any given amount. By Dr. Glover's logic, an increase of 10 cents in the ceiling rate would increase royalties by \$470 million, an increase of \$1.00 in the rate would up total royalties by \$4.7 billion, etc.-

As documented in detail in our statement and confirmed in Dr. Glover's own report on "standard variations," a large proportion of selections is not licensed at the ceiling now. There is no reason to believe that the relative bargaining power of the copyright holders versus the record companies will suddenly change sufficiently to alter this picture, no reason to believe that the record companies will sit by and acquiesce in a rise of all rates to a new ceiling.

B. Dr. Glover then proceeds to allege that this supposed \$47 million increase in royalty payments could cost consumers \$100 million. This assumes totally without substantiation that every record company, distributor, and retailer would seize on an increase in royalty costs as an opportunity to further fatten their profit margins, that they made an expectation of the profit margins. their profit margins, that they would succeed in this profiteering, and that their gain from a ceiling increase would thus be substantially greater than ours.

C. Dr. Glover argues that a higher royalty ceiling would reduce the quality as well as the quantity of recorded music, including the number of classical releases.12 There is no basis for such an assumption. Almost all classical music is in the public domain, and thus not subject to mechanical royalties; and by allowing composers and music publishers the chance to earn a decent income, a higher royalty ceiling will inspire a greater quantity and quality of music available for recording.

4. The use of incomplete data

Dr. Glover attempts to argue that total mechanical royalties have increased faster than the cost of living and median family income.13 Even if his figure

for total royalties were correct (it is not, see item 2 above and item 5 below):

A. He has carefully selected base years to yield this conclusion—he might instead examine the last 3 years, during which the Consumer Price Index has risen by 30 percent, median family income by 25 percent, record sales and prices by 26 percent, record companies' profits before taxes by 42 percent, but mechanical royalties by only 2.6 percent, a causing a 16 percent decline in their purchasing

B. He has chosen to ignore the size of the pool of songwriters and composers among whom these royalties are divided—in truth an increase of more than 100 percent in this pool over the last decade has, combined with inflation, caused a decrease of more than 40 percent in real royalties per writer; 15 and

C. He has likewise chosen to omit the key yardstick of net record sales, relative to which royalties (according to his own figures) have fallen from 11 percent in 1964 to 9 percent in 1971 and 7 percent in 1974.16

5. The use of inconsistent data and assumptions

A. Dr. Glover argues that the present 2 cent ceiling is not a ceiling but a uniform rate, at the very same time acknowledging the existence of substantial numbers of licenses for less than 2 cents. He dismisses these as simple "standard variations" but requires nearly 40 pages to explain them.

B. Dr. Glover argues that a higher ceiling would decimate record company profits,¹⁷ at the very same time that he assumes they would not use their bargaining position to negotiate for rates below a new ceiling level (see 3A above); he also argues that any increased royalty costs will be not only passed on to the consumer but used as an excuse for increased profit margins (see 3B above). hardly a profit decimating position.

C. Dr. Glover argues that the impoverished record companies made profits in 1973 from recording sales, before taxes, and excluding foreign fees and other income, of only \$16.5 million; 18 but in sworn courtroom testimony, the president

¹¹ Pp. 4. 18-19, 63-67.
12 Pp. 20, 22.
13 Pp. 4, 5. 10 11, 14, 30, 31, et sea.
14 Consumer Price Index: as reported by the Bureau of Labor Statistics; median family income: as reported by the Ceusus Bureau; record sales; as reported by Billboard, based on RIAA data, and given at table 16 of our statement; mechani al royalties; on p. 54 of Dr. Glover's statement; profits, p. 157 of Dr. Glover's statement.
15 As shown in cols. 13 and 14 of the summary table of our statement.
16 Pp. 47-49. Net record sales are valued at the prices charged by record companies to distributors. As a percentage of retail sales, royalties fell from 5.5 percent in 1964 to 4.5 percent in 1971 and 3.5 percent in 1974.
17 Pp. 4, 5, 17, 22, 30, 31, et seq.
18 P. 53.

of Warner Brothers indicated that these profits on an industry-wide basis were 34 cents per LP or tape, which would amount to total profits of more than \$100 million from this source alone.

For years record industry spokesmen in Billboard and elsewhere have proudly pointed to everincreasing levels of volume and profit. (For the most recent example, see Exhibit A attached.) Even by Dr. Glover's own analysis, record company profits before taxes over the last 3 years have risen 42 percent. The fact is that the major record companies are integral parts of huge entertainment conglomerates whose ability to shift profits and costs from one division of another in a consolidated balance sheet is legendary; and the constantly reiterated claim that the record industry is the only party to this dispute which has "revealed" to the Congress its true profit picture is a complete myth.

D. One final indication of the invalidity of this data: Dr. Glover asserts that the financial break-even point for a popular long-playing (LP) record is much higher than it is for a regular tape; ²² but for years the record industry has claimed that higher prices for tapes over LP's were justified on the ground that

the tapes were more expensive to produce.

Conclusion.—Dr. Glover's mass of irrelevant, unreliable, unsubstantiated, incomplete and inconsistent data and assumptions cannot alter or conceal one basic fact: his employers are asking Congress to hold down the ceiling on mechanical royalty negotiations, thereby continuing to permit authors and publishers only a steadily lower rate of return in real dollars and a steadily lower share of record prices and receipts, simply because they do not want to dip into their enormous profits on a hit song to pay the writer of that song.

[From the Wall Street Journal, Thursday, Oct. 30, 1975-p. 1]

HOT PLATTERS

The recording industry is busy setting records.

After being "brushed by the recession" earlier this year, business is booming, says a spokesman for CBS Inc.'s records division. "This has been the fastest turnaround in the history of the business," he says. The division's sales in the third quarter were a record and 19% above the previous year. Warner Communications Inc.'s recorded music division also had a record third quarter. "We haven't been able to press records fast enough," says a spokesman. RCA Records' third quarter sales were "the best for that period in our history," says Kenneth Glancy, president of the RCA division. MCA Inc. reports its domestic record sales are up 13% so far this year.

Warner cites several reasons for the recent surge. Among them are "a lot of new, good product" being offered on albums in preparation for the big Christmas season, a pickup in the economy and "a lot of buying" by college students this

Industry executives expect the boom to last a while. Says Walter Yetnikoff, president of CBS Records, "All indications are that this pattern of success will continue well into next year.

Mr. Danielson. Our next scheduled witness is Ralph Peer II, vice president of Peer Southern Organization, music publishers.

Mr. Peer?

I might say so that we do get through here, Mr. Peer is recognized for 5 minutes.

TESTIMONY OF RALPH PEER, VICE PRESIDENT, PEER-SOUTHERN ORGANIZATION; DIRECTOR AND OFFICER, NATIONAL MUSIC PUBLISHERS ASSOCIATION

Mr. Peer. Thank you, sir.

I am very pleased to be here today with two excellent composers who will speak following me. I am Ralph Peer. I am vice president of the

Billboard, July 6, 1974, p. 4.

The price of an LP at that time was given as \$5.98, the price of a tape as \$6.97. With LP's for every 2 tapes, the average price per LP or tape would be \$6.38. A unit profit of 34 cents would be 5.3 percent of \$6.38. Applying this profit percentage to 1973 industry sales of \$2.017 million yields a total profit of \$107 million.

P. 157.

Pp. 74-75.

Peer-Southern Organization which is an independent music publishing firm. It was founded by my father some 50 years ago and is now headed by my widowed mother. We were pioneers in American country music. We helped bring Latin music to this country and we are now

working in popular and symphonic music as well.

I take great pride in our work, in discovering, encouraging, and nurturing composers, promoting their works around the world, obtaining multiple recordings of their works, safeguarding their copyrights, representing them in negotiations with record companies and with others. I feel that we are making a real contribution to the enrichment of American culture. As a young man, I look forward to a lifetime in this business, fulfilling our responsibility to American music and keeping our company independent of the large conglomerates.

Frankly my future depends upon what you gentlemen decide. The bill you are considering will probably govern music copyrights for the rest of my life. Although record company opposition has apparently ruled out the concept of the percentage or royalty ceiling—like those adopted in most of the other countries in which my company is active—at least the concept of the copyright tribunal in the pending bill gives me some hope that the ceiling on our earnings will not be

frozen for another 66 years.

But the starting place for that tribunal will be the ceiling you place on the bill. If you fail to adjust it for these last 10 years of inflation I doubt that the tribunal will do so. If you fail to provide for a fair ceiling for my negotiations with record companies, then no amount of determination or bargaining skill on my part can obtain for our composers the level of incentive they need and deserve if they are to continue their creative activities.

Put yourself in my shoes. As publishers go, we are relatively large, but compared to the market power of the four or five record giants, we are minuscule. When they make me an offer which is below the statutory ceiling, frankly, I can rarely refuse it. They simply tell me that the package they are putting together will exclude our company and

our composers entirely unless we accept their terms.

If they are anxious to get a particular song or composer, I can at least make a counterproposal but I can never ask for more than the statutory ceiling, no matter how good the song is, because a record company can always get it for 2 cents. Frankly, we are sometimes passed by altogether because I will not accept an unjustly low rate for our composers. But usually we end up agreeing to a rate below the ceiling in order to have our music included.

Do you understand the position I am in? On the lower end of the scale, I am faced with a buyer's market in which the thousands and thousands of songwriters and publishers compete to provide the lowest bid for a handful of powerful record companies. The statute imposes

no floor, no minimum, only a maximum.

But in those instances where we might have some bargaining power, where we might have a song or a writer that is very much in demand, there Congress has cut off the law of supply and demand and inter-

vened on the side of the record companies to say that we cannot ask

for more than 2 cents per song.

This is not fair. If there must be a ceiling, it at least ought to be high enough to let us do a little bargaining when we have a great song. How else am I to meet my responsibilities to American music? How am I to encourage our writers to keep an writing and improving if the royalty per record, regardless of whether the song is trash or treasure, can be no more than 2 cents or 3 cents. When I represent these writers and their works in Europe, the royalty ceilings are generally 8 percent of the list price, which would be about 5.5 cents if it were in effect here. Why should they receive worse treatment at the hands of their own Government?

In conclusion, I ask you to remember that you are setting a ceiling on our negotiations, the upper limit, not a minimum or a fixed rate. We seek the right only to bargain on behalf of our composers when the song or situation warrant it. The higher the rate that you set, the closer we will be to a free market where actual payments will reflect

true market values.

Remember, finally, that a good song is the key to a successful record and to the success of the record industry. If we are to encourage real quality and variety and creativity in American music, do not trample over our songwriters. Turning them off in the long run will be bad for everyone connected with music, including the record companies.

I hope you will set a new ceiling that recognizes these facts. If you do, the composers and music publishers and music lovers throughout

the country will be most grateful. Everyone will benefit.

Thank you.

Mr. Danielson. Thank you, Mr. Peer.

We will now move on to Mr. Marvin Hamlisch of the American Guild of Authors and Composers who is recognized for 2½ minutes. The time is 14 minutes before 12.

Mr. Hamlisch. Good morning.

TESTIMONY OF MARVIN HAMLISCH, AMERICAN GUILD OF AUTHORS AND COMPOSERS

Mr. Hamlisch. I speak as a composer. I hope that I am the fellow that Mr. Pattison referred to when he said we need someone who is

able to do something about the mechanical rate.

I waited a long time in my life to get a hit song. Every songwriter writes many songs and they always hope that there will be something at the end of the rainbow—the big smash hit. Two years ago I was very lucky and received three Oscar awards: two for the music for the motion picture, "The Way We Were." Naturally, after the song "The Way We Were" sold over \$1 million of single records, I waited expectantly for the big check; I just knew that this was going to put me on easy street. I knew I was finally going to buy that wonderful Beverly Hills house. My parents were going to be proud and I was going to be fulfilled. When the "big" day came and the check arrived, it was for all of \$5,000.

So my song actually sold over 1 million records and I received \$5,000, based upon the mechanical rate as it is now computed. Of the

2-cent rate, the publisher gets one penny, I get one-half of the other penny because I only write the music, and the lyricist gets one-half penny.

A couple of things that I heard today bothered me. For instance, this idea that "By the Time I Get to Phoenix" has been recorded 91 different times on what we call "cover records" and that therefore

this is a spectacular and profitable event.

Let me explain why this is not representative of most songwriters' experiences. First of all, most records come out and are not recorded after that first record. What about all these songs that come out and are not smashes? Since Barbra Streisand is a very unique performer, "The Way We Were" gave me about 15 cover records, but nowhere near 91. It may be because the record people do not want to get into competition with Barbra Streisand; I do not blame them. But certainly, I do not want you to think that every time a record is released, even a small hit, it immediately proliferates into 91 other releases.

It bothers me and turns me off to the songwriting and record industries to know that the mechanical rate is so low. Also, I think that it is wrong to suggest that there should be no mechanical rate at all—leaving the writers, publishers, and record companies free to negotiate for a price. Composers give birth to a little child called a song and it is very hard to go to the record people and say that this child is worth so much or that this song is more commercial, so that I should get more money. Composers are very creative, sensitive people; I do not want to go into an office and start negotiating for what I think my song is worth.

I think that the best thing to do would be to introduce a floor and ceiling for the mechanical rate so that a composer can get a reasonable rate. Then, we would not have to always "bargain down" to a lower rate as we often do now. I, as a successful writer, can tell you that many times I have not gotten the statutory rate; less successful writers

may rarely get the full 2-cent rate.

In conclusion, let me just say that, Eubie Blake, from whom you will hear next, wrote a fantastic song years ago in 1921, called "I'm Just Wild About Harry." And the wonderful but sad thing that I told Eubie that we have in common is that he got paid exactly the same mechanical rate in 1921 as I got for "The Way We Were." Something is very wrong if album prices and record sales are going to continue to go up and the poor composer gets so little for his efforts.

"The Way We Were" sold over a million records and the "big" check was only \$5,000. I think we have to do something about that because we are putting a lot of composers out of business. Thankfully Mr. Blake and I also happen to be able to perform. Otherwise we

could not live. Thank you.

Mr. Danielson. Thank you, Mr. Hamlisch.

And our concluding witness on this side of the debate is Mr. Eubie Blake of the American Guild of Authors and Composers and I am going to take the liberty of saying that for a man of 92 years you sure look good.

TESTIMONY OF EUBIE BLAKE, AMERICAN GUILD OF AUTHORS AND COMPOSERS

Mr. Blake. I just want to say this: I have been on the stage 76 years, because I started in 1899. But this is the first time I have ever had stage fright in my life.

Mr. Danielson. Let me ask you—after 76 years, you think you

might make this your career?

Mr. Blake. My statement is that if I had to depend on just the royalties that I made from my music, I could not take care of my wife and family. So I agree with Mr. Hamlisch; I think that the mechanical rate should be raised. I am the worst businessman in the world. I do not know anything about business, I do not know anything about business, because all the businessman I know [gesturing]. And I do not want to get like that. So I think that the rate should be raised. Now, how far? I leave it to the economists to tell me how far it should be raised. I know it should be raised because I have been writing for years. But if I had to live off my royalties, my wife and I would be in the poor house tomorrow. Fortunately I can still perform to supplement by income. That is my statement and I am not going any further.

Thank you very much.

Mr. Danielson. Thank you, Mr. Blake. That is probably—I hate to say this Mr. Nathan and Mr. Gortikov—it is probably the most eloquent presentation today.

Mr. Drinan?

Mr. Drinan. Thank you very much, Mr. Chairman, and thank you

gentlemen.

I am sorry. I simply had to go to the markup of another bill during part of your presentation. I will ask Mr. Hamlisch first, even if the statutory maximum were increased from 2 cents to 4 cents, do I understand that you would still only get \$10,000 instead of \$5,000.

Mr. Hamlisch. Correct.

Mr. Drinan. So that you really would not be happy with what is

being proposed?

Mr. Hamlisch. No, I would be happy with that. I think that the 4 cents would be adequate—but, I would like to see Congress adopt a mechanical rate based upon a percentage of record sales—8 percent of sales. But, some people in the record industry do not seem to want to do that because it would be very hard to regulate. I think it would be adequate to adopt a ceiling of 4 cents.

Mr. Drinan. Would you tell me more about your recommendation along with Mr. Blake, that the mechanical rate should be a mandatory

8 percent of the sales price of the phonograph records?

Mr. Hamlisch. That is what most of the countries in Europe are getting now.

Mr. Drinan. Would you tell us more about that?

Mr. Hamlisch. The one thing about a percentage rate that I like is that it adjusts for the cost of living. If record prices go up, the composers will get more money based on percentages of prices.

I think the reason we are in a dilemma today is because in 1909, when a record sold at 35 cents instead of making the rate a percentage

of the list price, Congress set a flat rate of 2 cents. As record prices went up, the rate stayed the same. Now composers, lyricists, and publishers together get the same 2 cents out of a record that sells for over a dollar.

Mr. Drinan. Why do you not push for a percentage?

Mr. Hamlisch. I do not think it is a question of that. I think it is a question of persuading the other side. I do not think that it has ever been an open question.

Mr. Drinan. Try to persuade to Congress.

Mr. Hamlisch. I am perfectly willing to do that. With your's and God's help, maybe we have a chance.

Mr. Drinan. You will need more than God's help.

Mr. Hamlisch. Unfortunately, I think you are right. I think we need more than God's help. I think what we really need is to make sure that everyone understands the situation, because I know that most people do not understand what composers do. Most people say to me, were you not in the movie, "The Way We Were"? And I say, no, I just wrote the music. And they get very depressed by that.

Second I think that if I received \$10,000 based upon a 4-cent rate, I would be happy. I think that it would bring back some self-esteem to the composer. I think it is a rough life to live thinking that if you have a hit, a fantastic check will come in. When the check does come in, it is so small that they say, I cannot believe that this is it. I think that is our problem. Most people do not realize how low the rate really

Mr. Drinan. I take it, however, that you simply do not want the

total deregulation of the industry?

Mr. Hamlisch. No, because to be honest with you, composers are artists: we are not good businessmen. We are, I think, the easiest peo-

ple to intimidate. I must give you an example.

If today, someone in the record industry said to me that I can have Frank Sinatra record a song of mine if, instead of 2 cents, I would take a half-a-cent. My pride would say, for Sinatra I will pay to have my song performed. I think what happens is that the writer gets coerced, because the marketplace is limited by certain companies and by certain singers. For example, as you realize, many singers record their own material.

I would love Elton John to record my songs but normally he records his own. I would love Stevie Wonder to record one of mine but normally he records his own. So the number of artists I have available to me is very small. Therefore, when one of the top artists wants to do a song of mine, it is very easy for the record company to bargain against me. The company says, if you want this artist to record your song, you are going to take less than 2 cents. If Congress sets a floor on the rate, I will not be put in that position again.

Mr. Drinan. Going back to 1909—I am reading the law here—I find it anomalous how the Government interfered or intervened in the regulation, the very tight regulation, of this particular industry, and I am not entirely certain if the regulation is necessary, but apparently there are no votes for deregulation on the other side of the

controversy.

Mr. Patrison. You missed it.

Mr. Drinan. Oh, well, then, I am sorry. I had hoped that there was a deregulator—I had hope because it is a deregulator here.

One last question, in most of the European nations how is that

arrived at, by statute, by agreement, or union or what?

Mr. Feist. That is arrived at by negotiation between the International Federation of the Phonographic Industry (IFPI), which represents all, I guess, of the record companies on the Continent, and a bargaining organization representing the copyright proprietors. It covers all records released and is the subject of renegotiation from time to time, and it has gone from 7 to 8 percent in the last decade.

Mr. Drinan. Cannot we have that association come to the United

States and solve our problems?

Mr. Feist. There is some question as to whether or not under U.S., laws such bargaining could take place.

Mr. Drinan. Well, if the Congress will fix that up.

Mr. Feist. If Congress would fix it up, it could work beautifully. Mr. Drinan. Well, I am getting a little bit of hope. All right, thank you very much, gentlemen, and I am sorry, once again, that I had to miss part of your presentation.

Mr. Dantelson. Mr. Wiggins.

Mr. Wiggins. Mr. Nathan, did you hear or see the chart, and the statement about the chart, that the average payment per tune was roughly \$1,400 currently and was 2 years ago roughly \$600?

Mr. NATHAN. Yes; I saw that.

Mr. Wiggins. Do you agree with it?

Mr. Nathan. I have not had an opportunity, Mr. Wiggins, to check any of these figures. It does not seem to reconcile with ours, with our analysis, which is all royalties and all selections, and I do not know what difference there is between released tunes and others. I will look into the figures and analysis, and I would like to then submit observations on these, but, frankly, sir, I could not comment at the moment on the accuracy of those figures.

Mr. Wiggins. Mr. Chairman, I do hope that the witness will be given that opportunity because that is an important chart to me, and

your comments on it would be useful.

Mr. Danielson. I would certainly—we would bring it up with our chairman, but I am certain that we all want to be as well informed as possible.

Mr. Wiggins. Mr. Feist, you are representing publishers and I have a concern that part of the problem is with the publishers. Does your conscience bother you, taking 50 percent for the kind of service you

perform, which is essentially an agent service?

Mr. Feist. Mr. Wiggins, on this my conscience never bothered me, and we do not get 50 percent. We do, on occasion. The only standard contract that exists within the publishing business generally is one prepared by the American Guild of Authors and Composers. It includes a blank space for the insertion of the percentage which will be paid to the writers, and in parentheses it says, "but no less than 50 percent."

There are negotiations between some writers and publishers, just as there are between record companies and publishers—who are working on behalf of the song writers. It then depends on the relative

bargaining power. There are song writers who get as much as 75 percent, tv. 3-thirds, and this goes back many, many years. Also there are occasions when the song writer and publisher become partners in a joint enterprise. It is by no means a stereotype that there is a 50

percent division.

On the point of the publisher's role, he is not simply an agent. He is a creative factor in the music business. It is he who discovers, in most instances, and encourages young writers and supports them financially as they progress in their careers. He employs many promotion people. I think I am correct in saying Mr. Peer has a staff of 300. He follows through on a song after the initial hit.

After the first impact of "The Way It Was"—I was speaking of Mr. Hamlisch's publisher—he who went out and got those 10 extra records.

They did not just fall into anybody's lap.

I could, as you might imagine being a member of, well, a second generation member of, the music publishing business and having had some 40 years of my own life in it, I could go out on the role of the publisher. I hope you will accept my assurance that it is a vital central role in the business, and that we are not just agents who collect and distribute. We are far more than that. We are at least, let me say, as creative and as much a force as the record industry.

Mr. Wiggins, Well, I will accept your statement for consideration, but I have heard contrary statements which I will also consider. If, in fact, the weight of evidence is that most publishers are merely agents for their stable of writers, then the division of revenue of 50/50 does

offend my conscience.

I would like to think that you bargain at arms' length and reach an agreeable division. I am inclined to agree with you, sir, that the creators are often poor businessmen and that that blank space which savs "not less than 50 percent," but it becomes 50 percent in reality in all cases, in which event, whether it is conscionable or not, raises trust problems that your counsel should look into.

In any event. I share my troubles with you.

[Subsequently the subcommittee received the following letter from Mr. Feist:

NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC., New York, N.Y., October 3, 1975.

Hon. Robert W. Kastenmeier,

Chairman, U.S. House of Representatives, Subcommittee on Cour's, Civil Liberties, and Administration of Justice, Committee on the Judiciary, Washington,

DEAR MR. CHAIRMAN: In the course of the Subcommittee's hearing on September 11, 1975 regarding mechanical royalties time did not permit a full response to Congressman Wiggins' question regarding the music publisher's role and share of royalties. I take this opportunity to expand my answer for the record.

The allegation by the record industry that our function is largely that of an

adn nistrative and clerical onduit is wholly unfounded.

First, music publishers play an important creative role. Our business is songs: and as Chet Atkins, head of RCA in Nashville, has said. "The song's the thing. You can have the biggest and most expensive studio, the best sounding musicians and experienced engineers and technicians; if you don't have the song, the artist cannot be expected to have a hit." Neither can the record company. And in May 1974 Goddard Lieberson, then President of CBS Records and Chairman of the Board of RIAA, in his keynote address to the International Music Industry Conference in London, also noted that, "the basis of any successful record is the song." Some performers, he said, thought they could write their own material, but all too often their creativity tends to dry up quickly. "The time has come," Mr. Lieberson concluded, "for the re-ord industry to be more concerned and interested

in stimulating and relying on songwriters."

Music publishers discover and encourage new songwriting talent. They provide many a writer with substantial advances, annual guarantees or living allowances to enable him to acvelop his art. Their staffs often include not only business administrators but also creative directors, producers, editors and experts. They conduct workshops for novice writers, provide the kind of guidance and advice that young writers of songs need (like young writers of books), and in many other ways sustain and nurture the writer during the early and difficult periods of his career.

Recordings, by way of contrast, are merely one of many media for the transmittal of a song—an important medium, to be sure, and more technologically complex than most others, but not to be confused with its creative content. Music publishers, since the days of vaudeville, have worked with all the media or out-

lets for music and will continue to do so.

Second, music publishers play an important promotional role, once a song has been created. They make their own demonstration samples and promotional records at their own expense for the purpose of showcasing their writers' songs. They work to get not merely the initial recording but the maximum additional recordings of each song—interesting a popular artist in recording a country music selection, for example, or vice versa. They develop packages of selections or excerpts to bring their songs continually to the attention of record companies, broadcasters, disc jockeys, motion picture producers, the makers of television or radio commercials, and others selecting material for recording or performing.

While the record company promotes only a particular recording, the music publisher promotes the song, the writer, his other songs and compatible selections from their repertory. While the record industry is increasingly emphasizing current products, the music publishing business is a "catalogue" or repertory business which demands persistence not only in the creative function of establishing new songs, but in the promotional function of keeping older songs constantly before the public, seeking new opportunities for their use or new kinds of exposure. No meaningful song in a publisher's repertory is ever dead. Thus, although a record company's promotion is a temporary phenomenon while the artist or writer is at his peak, the publisher's continuity of commitment is an important stimulus to continuing earnings for the songwriter.

It is important to realize that as the media for communicating songs have changed, so, too, has the nature of the publishers' promotional efforts. And as changes inevitably will occur in the future, so, too, will the publishers' promo-

tional activities.

Third, music publishers play an important international role, once a song has been created and promoted in this country. They undertake on their own or with others its publication and promotion abroad in as many countries and languages as possible. They frequently not only select qualified lyricists for foreign language adaptations but also performing artists suitable for various countries. They may have to persuade the U.S. record company's foreign affiliate to release the original language recording overseas. They have often achieved for a song greater success in another country than it had enjoyed here. Record companies cannot and do not fill this role.

Moreover, American publishers acquire songs overseas and commission appropriate English language lyrics which make foreign songs acceptable and

often successful in this coul try.

Fourth, music publishers do indeed play an important administrative role. They represent the author in negotiations with respect to multiple uses of his song—not only in recordings but in motion pictures and otherwise, at home and abroad. Through he NMPA licensing service, The Harry Fox Agency, fees are collected and audited. The importance of this efficient form of protection for the author is indicated by the fact that recoveries made through these audits amount to almost 5% of all royalties paid.

Finally, this brings us to the question of the di ision of royalties on recordings between songwriters and publishers. The writer's normal minimum has been 50% for many years, and is regarded as comparable to other earnings bases of tradebook writers as well as songwriters. (In the only "standard" contract that exists in the business—the American Guild of Authors and Composers contract of 1948—the author's percentage is left blank but the printed text specifies

that in no case is it to be less than 50%.)

In a speech to a memoership meeting in California, Edward Eliscu, then President of the American Guild of Authors and Composers, stated that where the publisher does his job in promoting a writer's song. he is surely entitled to his 50%. And the current AGAC President, Ervin Drake, recently said, "we view publishers as our partners in a sense that is best expressed by the word 'symbiosis'. It is true that a publisher's work may not begin till our work is complete; but, in the large sense, our work is not complete until they exercise their functions properly as publishers." In short, songwriters and their pub-

lishers are partners in the true sense of the word.

In fact, the writer's share in mechanical royalties is frequently more than 50%, depending on his bargaining power. A writer with a consistent record of success is in a very strong position to negotiate with the publisher for a higher percentage. A successful writer may also choose to establish his own publishing company, either an independent firm or one managed for him by an established publisher, publishing his own songs and, in some situations, songs by others. For example, Charles K. Harris, a Tin Pan Alley pioneer and the writer of many great successful songs such as "After The Ball," was his own publisher and published works by others. For almost 30 years Irving Berlin has been his own publisher. The list of other contemporary writers who own their own publishing companies is so extensive that the following only suggest the extent of this practice: John Denver, Paul Simon, Elton John, Burt Bacharach, Lennon & McCartney (The Beatles), Charlie Rich and Loretta Lynn.

Another practice by which a writer obtains more than the customary 50% is by the establishment of his own publishing company in partnership with his original or another publisher. Among the many who have utilized this approach are George Gershwin, Jerome Kern, Jerry Herman ("Hello Dolly"), Walter Donaldson ("My Blue Heaven"), and Rodgers & Hammerstein.

In short, the relationship varies from writer to writer, some of whom are also artists, some of whom also employ their publishers as agents, and some of whom utilize no publisher at all. That is why it would be unsafe to generalize regarding the division of mechanical royalties between author and publisher, much less legislate on the subject.

Thank you for this opportunity to provide only a brief indication of the manifold activities of music publishers, their labors on behalf of writers and their

contributions to the American music scene.

Sincerely.

LEGNARD FEIST.

Mr. Danielson. Mr. Hamlisch, make it brief if you can. We are

going to get a quorum call in just a minute.

Mr. Hamlisch. I just want to tell Mr. Wiggins one thing having to do with that. I feel that the argument is not with the publisher because when I went into New York last year to compose the music for "A Chorus Line." I did it with a new writer by the name of Ed Kleban. He is not a proven writer yet. He has been subsidized for the last few years, been given money by a publishing company to actually be able to live and to be allowed to write.

I think that for every instance where a publisher, say, is a person who does not help, I think that there are a vast amount of people who can tell you that there are people getting paid w'hout yet, you know, giving material, just by having faith in an individual, and, obviously, Ed Kleban now has proved that he is good, and the publisher now has proved that it was worth the investment.

I just want to make sure that you understand that the plight of the composer is not up against the publisher because we have had great success with dealings with publishers. It is elsewhere where we seem

to get into trouble.

Mr. Danielson. Mr. Pattison.

Mr. Patrison. Mr. Hamlisch, the \$5,000 check you got, those are not the only earnings you got from "The Way We Were."

Mr. Hamlisch. No, that is right.

Mr. Pattison. You get earnings from ASCAP, or something like that?

Mr. Hamlisch. T' at, again, is a situation where everything depends on how big the record hit is. When we talk about "The Way We Were" and "By the Time I Get to Phoenix," we are talking about giant hits, so the performances of ASCAP customarily will be good. When we say, what is good, I would say that we are talking between \$20,000

and \$30,000 worth of performance on those kinds of songs.

Many times, however—and I think that the majority, particularly in the rock and roll industry, as opposed to songs like "The Way We Were" which becomes a standard and the Phoenix song, which is a sindard—many times you have a song hit in January and it has died in February and you never hear it in March. And then, the ASCAP money is very minimal. It is just a question of how many times it is played on the radio and television, and it does not last. The thought that it lasts forever, you know, is erroneous.

Mr. Patrison. I understand that, but if you make hula hoops and they are good in January and they are no good in March, the same

thing happens.

Mr. Hamlisch. Correct. Mr. Feist. May I add——

Mr. Danielson. We are going to have to stick with Mr. Pattison's questions at this time.

Mr. Patrison. I have a few other questions here. Mr. Feist, perhaps,

could answer this one, Mr. Peer.

Just as it is perfectly possible to settle your own negligence case without a lawyer or sell your own house without a lawyer, a composer can sell his own songs without a publisher, is not that correct? I mean he can buy himself a typewriter. There is no law that requires anybody——

Mr. Feist. Oh, no.

Mr. Patrison. Or a publisher can do its own composing, is not that correct? Cannot a publisher hire a person as a composer for 40 hours a week and say, you do not have any copyright, in other words, you agree that as part of your employment you will turn over your copyright?

Mr. Feist. Not in today's world.

Mr. PATTISON. But I am talking legally.

Mr. Feist. Oh, yes.

Mr. Fattison. There is no requirement. In fact, you can buy a song, can you not, from somebody? A guy comes along and says, I will sell you the song for 50 bucks. I think "Goodnight, Irene" was sold that way, 15 times I understand in 1 day to different publishers. So that there is no statutory requirement; 50 percent is simply a custom of the trade, equity that people belong to certain organizations have agreed that they are not going to take less than 50 percent. You are saying not less than 50 percent is in your contract, but you can cross that off too, could you not?

Mr. Feist. Let me make clear, that contract is not universal. It is

only a standard contract.

Mr. Partison. But, I could draw up a contract that says 10 percent, whatever deal we want to make between the publisher.

Mr. Feist. Precisely.

Mr. Pattison. In Mr. Peer's case, he says he is having difficulty dealing with the record companies, for example. He is going to have—they are going to pay him a cent and a quarter, why do you not—you could buy yourself machinery and make yourself, you could be in the business, could you not?

Mr. Peer. The question of ease of entry into the record business is,

perhaps, an economic one.

Mr. Pattison. I am speaking very theoretically.

Mr. Peer. Technically, any person can be in the record industry.

Mr. Pattison. In fact, it is being done. Are not publishers going into the record business and recording companies going into the publishing business?

Mr. Peer. That is true. However, the area of control in the record business is in marketing and distribution. It is not in creativity. The

difficulty of entry is in distribution.

Mr. PATTISON. And capital and a lot of other things? Mr. Peer. That is right, but at this point in time—

Mr. Pattison. Oil companies can be in the marketing business or not be, right.

Mr. Peer. Yes, sir.

Mr. Pattison. They should not be.

Mr. Peer. Sir, may I respond to your original question about the percentage to composers?

Mr. Pattison. Yes.

Mr. Peer. As an example, we have signed two composers recently that we are subsidizing. They are unproven, have not had hits, and the percentage split between us in on a 75/25 basis because we think that they are particularly gifted.

Mr. Pattison. Yes, you are not doing that out of the goodness of

your heart?

Mr. Peer. No, we feel we need to do that in order to have them with us.

Mr. Pattison. You are buying a guy in the minor league that you can get cheap that you would not be able to get after he has made the majors.

Mr. Peer. That is absolutely true.

Mr. Patrison. You are building up good will with him, and he is going to be loyal to you.

Mr. Peer. We are paying them 75.

Mr. Pattison. I understand that, but it is simply a matter of bargaining. If you thought you could achieve the same result by paying him 25 percent—

Mr. Peer. Absolutely. It is a free market. Mr. Patrison. I have no further questions.

Mr. Drinan. Mr. Chairman, I have a question for Mr. Pattison. How come you know so much about "Goodnight, Irene"? Is he a double agent here; is he from the industry?

Mr. Danielson. You need not answer that.

Mr. Pattison. That was Leadbelly. I heard Pete Seeger do that story.

Mr. Danielson. Following that, Mr. Pattison—and I am referring to you, Mr. Hamlisch—in addition to the \$5,000 that you refer to and

the ASCAP money, do you not also receive some type of considera-

tion for the use of this in the motion picture?

Mr. Hamlisch. You are looking at a person who, because I was not happy with the way things were going as a composer—right, "the way things were," thank you—that was a "sting" in the room there—with my business as a composer, I went to other sources, that is, I became a movie composer, so naturally I got a fee. Most people are not as fortunate as me.

Mr. Danielson. I think your answer was yes.

Mr. Hamlisch. Yes, but that is just for a movie song.

Mr. Danielson. That is my only question.

I would like to know—perhaps Mr. Feist can help me here—I think that you and your family have been in this business for a long time, right?

Mr. Feist. That is true.

Mr. Danielson. I remember when I was a boy, there was a tune called "I Wonder What's Become of Sally" and I think that it said Feist Publishers.

Mr. Feist. We never did find out.

Mr. Danielson. I would like to know this. About how often in your industry is the situation one in which the publisher buys the copyright, takes the total assignment or purchase, rather than just a contingent-fee contract?

Mr. Feist. I would think that is almost nonexistent today.

Mr. Danielson. It is almost all on a contingent-fee basis, and that would call for a percentage participation.

Mr. FEIST. Division of the income between the writers and the perti-

nent composers.

Mr. Danielson. Of the selection of tunes you have in your portfolio, could you give us a ball-park figure, what percentage do you own outright of the copyright, what percentage do you have under the contingency arrangement?

Mr. Feist. Since I am not now in the publishing business, may I

refer to Mr. Peer?

Mr. Danielson. Except he is such a youngster.

Mr. Peer. It is my father who started the firm, sir. We do not have any songs at all, we have no songs in our catalog that we own on a complete basis.

Mr. Danielson. Then it would follow that if the rate were raised,

the composer would participate?

Mr. Peer. Absolutely.

Mr. Danielson. It is not a situation where the successor in interest, the copyright, would get the raise, and the composer would sit there, as Mr. Blake says, and be like a fly?

Mr. Peer. Not at all in our company, sir, and I doubt in any others

that we know about.

Mr. Danielson. In negotiating, how frequently does the rate exceed 2 cents?

Mr. Feist. Only when there is a composition of extended length; in other words, a symphonic work which might take 20 minutes. Some years ago when the LP came along, by accommodation between the recording industry and the publishing industry, that rate was established at a quarter of a cent a minute.

The record industry recognized the 2 cents really was not enough for a symphonic work that could be put on one side of a record, so that is what those figures over 2 cents cover.

Mr. Danielson. Could the recording industry—why cannot they

enforce the 2-cent rate in that sort of work?

Mr. Feist. I would hope that they would not, but they could. I

believe they could.

Mr. Danielson. I was looking for some kind of a loophole here which you could get around. Are those compositions in the public domain, perhaps?

Mr. Feist. No, although this gives me an opportunity to make the

comment that I was anxious to make.

When the record industry talks about classics, they are mostly talking about public domain works. There are woefully few contemporary compositions available on recordings presently under copyright or written by living composers, so the one-quarter cent rate would not apply to the classics. Did I answer your question?

Mr. Danielson. What rate?

Mr. Feist. One-quarter cent a minute would apply to copyrighted classical works.

Mr. Danielson. I see, and the last question I have here is really, throwing it right out into the ring for anybody to snap at it if they wish. Here is the question. The compulsory license seems to have served a purpose in one respect, at least, of making the music available to any recoiling industry or company that wishes to make a recording. The rub comes when we come to the ceiling of 2 cents.

It seems to be pretty hard to have a compulsory license without some kind of a rate or fee also included within that law, so the question seems to be, which equity is the heavier here? Is it better to have a compulsory license without, with a fee, or have no compulsory license with a potential of monopoly, but with open negotiations?

I just wonder if there could be some alternative. The thing that bothers me right now, could we have a compulsory license with the provision that the licensee would never have to pay open to negotiation on the first publication, but that the subsequent licensees, the compulsory licensees, could not be compelled to pay any more than the highest rate charged by negotiation.

Mr. Feist. I think there would be great danger in that, Mr. Danielson. If someone were extremely eager—and this would be usual—to at first exposure of a new song or a new work, he might then make a deal at an unrealistically low price just to get it in circulation, and

then under your concept he would be tied in every one of the subsequent licenses and every other recording of that work.

Mr. Danielson. Of that particular work.
Mr. Feist. He would be tied to an unfortunate deal that he may

have made for reasons of anxiety or some other-

Mr. Danielson. Of course, you have free enterprise entering in there in fixing the rate. I want to think about that further. Mr. Hamlisch, here now, he has a real giant smash hit, and he could probably next time around get 4 cents if he wanted to.

Thank you all very much. We must adjourn this particular committee, this particular subcommittee hearing, subject to the call of the Chair. I am going to leave the record open since there is no objection

to have our subcommittee chairman make a final determination of how much of this statement will be quoted in the permanent record, but the committee now stands adjourned.

[Whereupon, at 12:15 p.m., the subcommittee adjourned, subject

to the call of the Chair.]

[Subsequent to the hearing the following letter was received for the record:]

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, New York, N.Y., July 8, 1975.

Hon. Robert W. Kastenmeier,

Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I submit this statement on behalf of the 330,000 members of the American Federation of Musicians of the United States and Canada.

Though thoroughly committed to the objective of enhancing the materialistic rewards for the contributions made by creative artists, we are deeply concerned over the proposed in rease in mechanical royalties set forth in Section 115 of S. 22 and HR 2223.

It is one thing to enlarge the monetary return of all creative artists; it is quite another to grant a disproportionate portion of a finite source, the profits of the employer, to one segment of creative workers at the expense of all other such workers. And that difference is emphasized where, as here, the favored segment is given its share by legislative flat whereas the others are subject to the inevitable vagaries and risks of collective bargaining.

Nor does our opposition to Section 115 reflect the slightest desire on our part to freeze the income of composers to that prescribed by the Congress in 1909. On the contrary, our opposition is premised on the indisputable fact that such income has been handsomely improved throughout the years. When the 2 cent rate was established, the typical record consisted of one tune. With the advent of the long-playing record, it typically consists of 10 to 12 tunes. And the income derived from this automatic increase of better than 1000% per record has been dramatically compounded by the explosion in sales volume in recent years.

Viewed against these profound changes in technology and sales the proposed increase from 2 cents to 3 cents per song, or 3 cent per minute, is far more traumatic than some may think. Indeed, it has been reliably estimated that this change would impose on the industry an additional cost of approximately 50 million dollars a year. So heavy a burden will inevitably depress (1) production, (2) sales and (3) the bargaining power of those unions, like the American Federation of Musicians, whose members enjoy no similar protection. The reduction of all three would adversely affect the lot of musicians.

A drop in production would mean even fewer jobs for musicians whose unem-

ployment is already assuming the proportions of a national disgrace.

Bargaining against Congressionally mandated new industry costs of such huge dimensions will render even more difficult our continuing effects to improve (or indeed, even to maintain) existing standards of pay and other working conditions for musicians.

And a diminution in sales will directly reduce two highly valued, significant

sources of income and work opportunities now enjoyed by musicians.

As you may know, many years of intensive bargaining—including two national strikes—have produced a collective agreement under which the industry contributes monies to two types of funds for each record it sells.

The Special Payments Fund is in the nature of a supplementary wage pay-

The Special Payments Fund is in the nature of a supplementary wage payment to members who work in the industry. Last year approximately 10 million dollars was distributed to those musicians. I repeat, any drop in sales will auto-

matically diminish such supplementary wage payments.

The Music Performance Trust Funds are an American phenomenon whose uniqueness and value cannot be overstated. Their basic mission is to sustain and encourage the use of live music which has been and continues to be seriously curtailed by all forms of recording. This mission is achieved by providing concerts that are free to the public in every area of our country and Canada. The Trustee of these Funds is, by far, the largest single employer of musicians the

world has ever known. And I am aware of no other instance where the public enjoys such superb musical entertainment and enrichment without any costs—not even that of taxpayers. Here again, the drop in sales will directly reduce both the jobs of our musicians and the joys of our citizenry.

For the foregoing reasons—which I truly believe to be compelling—I earnestly

urge rejection of the change proposed in Section 115.

Respectfully,

HAL C. DAVIS, President.

U.S. SENATE, COMMITTEE ON APPROPRIATIONS, Washington, D.C., October 8, 1975.

Hon. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Wushington, D.C.

DEAL MR. CHAIRMAN: It has come to my attention that the Subcommittee on Courts, Civil Liberties, and the Administration of Justice is currently considering proposed amendments to Section 111 of the Omnibus Copyright Bill, H.R. 2223, which will affect copyright matters that pertain to non-contiguous cable systems.

As the author of the amendment to the Copyright Bill which these amendments would directly affect, I would like to take the opportunity to comment on the proposed changes. Generally, I feel these proposed amendments would have the effect of improving my amendment. However, I am concerned that if certain provisions contained in these proposed amendments are accepted unchanged, the original intent of my amendment would be defeated.

Initially, I would like to express my sincere appreciation to the parties involved in drafting these amendments, and in particular the representatives of the motion picture industry. Their hard work has given the subcommittee the

opportunity to make further improvements in Section 111.

The thrust of the amendments before you is aimed at perfecting my amendment by adding several sections intended to safeguard the holders of copyrighted video material from unlawful duplication and piracy of tapes. As I have mentioned, I feel that, in theory, these are desirable improvements.

Also, I am extremely pleased that all parties concerned with the effects of my amendment are now in agreement with, and supportive of, the principle behind it. That is: bringing non-contiguous cable systems on an equal footing with con-

tiguous cable systems in regard to copyright matters.

However, it is this same concern for equitable treatment which has led me to question some additional aspects of these proposed amendments. Specifically, I am concerned with Section 111(e)(2) of the proposed changes dealing with legal transfer of video tapes between systems, commonly referred to as "bicycling." Unfortunately, coverage under this provision, as drafted, has excluded Alaska as well as Hawaii. The omission of Alaska is particularly glaring in that my state contains the largest number of cable systems directly affected by the proposed amendments. Further, if left unchanged, these amendments would write into law unequal treatment for systems located in non-contiguous areas. A principal reason behind the drafting of my amendment was to provide equal treatment between systems in both contiguous and non-contiguous areas.

Alaska is the only non-contiguous state where the bicycling of tapes within cable systems is an established practice. As such, it is imperative that the subcommittee have a firm understanding of the uniqueness of cable operations in

Alaska, and the effects these amendments will have upon them.

With the exception of a single national news program, and, occasionally, a specially arranged program great national interest, such at the first moon landing, Alaska receives no we television. Consequently, the nearest market

providing live television is Seattle.

The communities receiving cable service are spread across the breadth of the state. Those located in Southeast Alaska are between 500 and 1,000 miles from Seattle, while Point Barrow is almost 2,000 miles from live television broadcasting. Thus, not only are these cable systems a great distance from Seattle but they are also very distant from one another.

These cable systems are located in small communities where there is usually one predominant industry, such as fish 3 or timber. The largest communities served by cable systems are Ketchikan and Juneau with 6,000 and 7,000 persons respectively. The average population for all these communities is approximately 3,000 persons. Several, such as Kotzebue, Nome, and Point Barrow, are Native communities where television is r t only an educational and entertainment medium, but also is a primary tool in efforts to combat a most serious problem of alcoholism.

Thus, cable systems in Alaska are an integral part of the still developing communications network of the state. In most cases, they provide these small communities with their only video link with the outside world.

The cable systems serving these areas are already saddled with many difficult problems stemming from their isolation. The bicycling of tapes enables these systems to cope with the tremendous expense involved in providing cable service in Alaska. Since most of the 12 small communities which have cable systems receive programming originally taped in Seattle, exclusion from the section pertaining to bicycling would cause significant disruption in programming and service as well as requiring these stations to pay an added expense which they cannot bear. The exclusion of Alaska cable stations from the established practice of

bicycling tapes within systems while allowing such practic, in other non-contiguous zones would be a grave injustice.

Additionally. I would like to point out a problem contained in Section 111(e) (1) (C) (ii) which deals with prevention of duplication during the actual taping process. Again, this appears to be a proposal designed to cover only a certain portion of non-contiguous cable operations, namely those which have their own taping facilities. Taking for cable systems in Alaska is done in Seattle by separate firms. As such, there is no possible way cable systems of this type can guarantee they will prevent duplication (during taping) by facilities they neither own nor operate.

Although I am sure that the subcommittee is familiar with the legislative history of the "Stevens Amendment," I do believe a cursory review of its purpose

will be helpful in understanding the problems I have outlined.

Cable systems in non-contiguous zones, such as in Alaska and Guam, are too far from the mainland to receive television signals off the air or by microwave. Therefore, there is no way these systems can get their full programming without taping. The taping is done in the contiguous 48 states and shipped for cable-casting. When aired, the program is a nonsimultaneous secondary transmission.

Under present law, cable systems that take signals off the air or receive them by microwave for simultaneous broadcast do not violate copyright laws. This principle has been supported in Fortnightly Corp. vs. The United Artists Television Broadcasting System, (342 US 296) and Teleprompter Corporation vs. Columbia Broadcasting System, (43 LW 4323). However, the law is unclear with respect to cable systems which broadcast non-simultaneously.

The Congress has expressed its opinion, as evidenced in the Copyright Bill, that copyright owners should be compensated for cable transmission. The caple broadcasters have accepted this in principle. The technique which will be employed to achieve this will require cable broadcasters to pay a fee into a general fund from which copyright holders may draw payments. This technique is designed to avoid protracted individual bargaining over programs and prices.

Unfortunately, because of the unclear legal status of non-contiguous cable systems, this is precisely what has begun to develop in these areas. Non-contiguous cable systems have found themselves faced with the very real threat of program-by-program, system-by-system negotiations with every single copyright

holder for permission to carry programming.

My amendment was designed to place all cable systems on an equal basis under the law, and to help disperse legal clouds shrouding the status of non-contiguous cable systems as regards copyright matters. That is why I am concerned that any further changes regarding this situation retain this "equal footing" concept between cable systems.

As your subcommittee may know, Alaskan cable systems did enter into a consent agreement last year with certain motion picture corporations covering the use of copyrighted material. This is a three year agreement of which one year has already expired.

This consent agreement does not solve the basic problems addressed by my amendment. It simply binds the parties to a temporary settlement covering a certain percentage of broadcast programming. The threat of further litigation

from other sources, and/or renegotiation upon the expiration of current settlements fully exists. It should be remembered that these cable systems are now paying copyright while their contiguous counterparts are not.

Also of note as the fact that this current agreement allows for the bicycling

of tapes as has been the custom in Alaska.

As the subcommittee knows, the tremendous changes, technological and otherwise, which have occurred since the initial copyright laws were drafted in 1909 have rendered many of these statutes obsolete while spawning vast new areas of uncertainty with respect to copyright protection and application. The Congress has been working on a total package approach to general copyright revision for many years now.

It has always been my belief that a comprehensive, long-term approach to copyright revision is the proper course. Because of this I have attempted to address matters of concern to my state in this area strictly within the body

of the Omnibus Copyright Bill.

It is my sincere hope that the subcommittee will recognize that any agreement pertaining to the unique problem of non-contiguous cable operation should include all systems it affects if drafted into the Copyright Bill. To do otherwise

would be contrary to the spirit of equitable reform.

Accordingly, in order that the deficiencies I have outlined be corrected, I am recommending that the following changes be made in the amendments to Section 111 of H.R. 2223 proposed by Mr. Richard L. Brown in his September 15 letter to the subcommittee and subsequently presented before the subcommittee by representatives of Guam Cable Television and the motion picture industry during hearings on the Copyright Bill held September 18.

In the proposed amendment to H.R. 2223, Section 111 (e) (2) (C) (ii), which reads: "prevents duplication while in the possession of the facility making the videotape for the system," should be changed to read: "prevents unauthorized duplication while in the possession of the facility making the videotape for the

system, where the facility is owned by or under the control of the system,".

This wording will allow for full compliance with this section by cable systems

which own their own taping facilities as well as those who do not.

Additionally, that part of Section 111(e)(2) of the proposed amendments which reads: "except that any cable system in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands may transfer," should be changed to read: "except that any cable system in Alaska, Hawaii, Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands may transfer"

Further, that portion of Section 111(e)(2) of the proposed amendments which reads: "to another cable system in Guam, the Northern Mariana Islands or the Trust Territory of the Pacific Islands, if:" should be changed to read: "between and among cable systems in Alaska; between and among cable systems in Hawaii; between and among cable systems in Guam, the Northern Mariana Islands and the Trust Territory of the Pacific Islands, if:".

Again, I must emphasize that I do feel these underlined changes are essential if the keynote principle of equitable treatment between cable systems is to be

maintained.

I would greatly appreciate the inclusion of my letter in your hearing record at

the appropriate place.

Thank you very much for your consideration of this matter which is of great importance to the cable systems in Alaska and elsewhere. I stand ready to work with you on this matter should you desire it.

If you desire any more information on this subject, please don't hesitate to contact me or have one of your staff contact Errie Kelly at x41038.

With best wishes,

Cordially,

TED STEVENS, U.S. Scnator.



COPYRIGHT LAW REVISION

THURSDAY, SEPTEMBER 18, 1975

House of Representatives, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY, Washington, D.C.

The subcommittee met, pursuant to recess, at 10:15 a.m., in room 2226, Rayburn House Office Building, the Honorable Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, Pattison, Railsback,

and Wiggins.

Also present: Herbert Fuchs, counsel; and Thomas E. Mooney, associate counsel.

Mr. Kastenmeier. The committee will come to order. This morning's hearing on copyright law revision relates to a number of miscellaneous issues. First, we shall receive testimony from four witnesses who wish to be heard on the so-called manufacturing clause, section 601 of H.R. 2223. We will examine these witnesses when they have all testified.

At earlier hearings, the subcommittee received testimony of governmental witnesses, notably from the State Department, on this partic-

Second, we are scheduled to hear testimony on H.R. 4965, introduced by Mr. Won Pat, Delegate from Guam, that would provide a nonsimultaneous recording right for transmission on cable systems in noncontiguous areas.

Third, we will hear testimony on ephemeral recording right provisions with respect to music of a religious nature, section 112(c) of the

bill.

Lastly, we will receive further testimony on public radio and the

handicapped.

At this time, then, the Chair is very pleased to welcome our first witness, Mr. O. R. Strackbein, representing International Allied Printing Trades Association. Mr. Strackbein, you testified before the subcommittee just over 10 years ago in August of 1965. We welcome you back.

TESTIMONY OF O. R. STRACKBEIN, REPRESENTING INTERNA-TIONAL ALLIED PRINTING TRADES ASSOCIATION

Mr. STRACKBEIN. Thank you. It seems quite a while from when I testified on this subject the last time. I am happy to be back. I hope this time that we will go through.

I appear here as the legislative representative of the International Allied Printing Trades Association to testify on H.R. 2223, a bill for

the general revision of the copyright laws.

The International Allied Printing Trades Association is composed of the combined printing trades unions affiliated with the American Federation of Labor and Congress of Industrial Organizations.

These unions are:

The International Typographical Union; The Graphic Arts International Union; and

The International Printing and Graphic Communications Union. When I testified previously, there were, I think, five or six of these international unions, but there have been some mergers since that time, and the number is now down to three, but the membership remains at upwards of 575,000. So, I will skip that part and go on to

the substance of their position.

We believe that the manufacturing clause, which has been in existence in somewhat of a modified form since 1909, should be retained as it stands in H.R. 2223, unmodified. The original purpose of the clause itself remains unchanged. Numerous assaults have been made against it over the years, but it has stood the test of time. It is not necessary here to spell out the meaning of the clause other than to say that with a reasonable exception all books of nondramatic literary material, authored by an American national, printed in the English language must, in order to enjoy copyright protection in this country, be manufactured in this country. The exception is that of 2,000 copies to permit testing the market.

The reason for this requirement is the maintenance of employment in this country at levels of compensation and under working conditions that are in keeping with the standard of living achieved here and

maintained over the years.

Until recently foreign wage Lvels have remained at levels far below

those prevailing in this country, including the printing trades.

While during the recent worldwide inflationary period foreign wages have risen, the narrowing of the wage differential may be temporary. It is still quite wide in any event, and imports of printed matter by t' country have increased from \$97.2 million in 1966 to \$271.3 million in 1974. This represents a near tripling of imports.

Some of this sharp increase may be attributable to the removal of our duty on books under the Flerence Convention which was negotiated under the auspices of UNESCO, the United Nations Educational, Scientific and Cultural Organization, and ratified by the Senate. It

took effect in 1966.

Opposition to the manufacturing clause is often based on the simplistic objection that it is protectionist. However, a copyright is itself protectionist in the sense that it bestows a monopoly on the author or his publisher. That purpose is contained in section 8, article I, of our Constitution. The purpose is to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings at discoveries.

The Universal Copyright Convention extends copyright privileges in this country to foreign publishers but does not preclude this country's setting forth the conditions under which the monopoly privilege may be enjoyed. Foreign authors are not excluded from the enjoyment of

copyright in this country. They must merely, under the clause, conform to the conditions that will place them on the same plane as American authors.

The importation of books, free of duty, has increased from \$48 million in 1967 to \$125 million in 1974. They are included in the more general classification of printed matter and represent nearly a half of

the total as recited in a preceding paragraph.

With importation free of duty, the principal inducement to manufacture books abroad, as indicated above, lies in generally lower wages prevailing in many foreign countries. Of principal concern to the printing trades in this country are possible sources of cheap labor such as still prevail in the Far East and across our borders in Mexico.

Wage comparisons admittedly leave much to be desired if the purpose is to determine comparative costs of production. Rates of wages must be translated through exchange rates, and when these fluctuate as they have in recent times, we encounter considerable difficulty in arriving at satisfactory comparisons. Moreover, productivity, which is to say output per man-hour, varies considerably from country to country. The so-called fringe benefits may also vary from country to country.

Yet, when all this has been said, two other considerations will contribute to the relevance of comparative wage rates. In recent years, productivity in other industrial countries has advanced quite sharply. The United States no longer enjoys the great lead in this respect that was formerly her advantage. The higher wages here went hand in hand in many instances with higher output per man-hour. Modern technology, including that of the printing industry, is now quite widely diffused throughout the world, at least in many countries.

Second, the wage differentials between the American printing industry and the foreign are, in some instances, still very wide, especially so far as countries of the Far East are concerned, as well as Latin

America.

Now I have a listing here, Mr. Chairman, of comparative wage rates and——

Mr. Kastenmeier. Without objection, your entire statement with

the detailed listings will be accepted for the record.

Mr. Strackbein. I think it is probably enough, without running through these lists, to say that, so far as the Far Eastern countries are concerned, like Japan, Korea, Hong Kong, et cetera, which are most likely to export books to this country and where publishers have the books printed, their monthly rates look more like our weekly rates, or even Lss. The same is true of Mexico.

Now, in the European countries, such as Britain, Belgium, France, West Germany, and so on, the rates are considerably higher or markedly higher than they are in the Far Eastern and Latin American countries, but yet those rates are also still lingering quite distinctly

below those prevailing in this country.

In Britain, for example, turning to page 7 of my statement, the wage for the printing trade was paid at the level of \$62 for ty pographers and lithographers and gravure-printers in 1974. That is, of course, per week. But, in this country, the American rate for bookbinders was \$150, while the rate for typographers was \$212 and for gravure-printers,

\$269. So you will see a considerable gap between the British rate in

the printing trades and those prevailing in this country.

West Germany's were higher than in Britain and higher than those in France. Norway and Sweden and Switzerland have distinctly higher rates than these other countries.

Mr. Kastenmeier. Thank you. We have a system of allocating time to witnesses, and you have exceeded your 5 minutes' time, unless Mr. Van Arkel wishes to concede all of his time. He, too, has 5 minutes.

Mr. VAN ARKEL. Why don't I give him 3 minutes and-

Mr. Kastenmeier. Well, I think he has already consumed 3 minutes of your time.

Mr. Strackbein. You mean I have consumed that much of his time beyond my own?

Mr. Kastenmeier. Yes.

Mr. Strackbein. Well, in that case, I have just about completed the whole statement, by picking up these rates. Switzerland does have the highest rate amongst the countries that were tabulated, but Switzerland is not a country that I think will give us trouble in this field.

Mr. Kastenmeier. Well, thank you.

[The prepared statement of O. R. Strackbein follows:]

STATEMENT OF O. R. STRACKBEIN, LEGISLATIVE REPRESENTATIVE, INTERNATIONAL ALLIED PRINTING TRADES ASSOCIATION

I appear before you as the Legislative Representative of the International Allied Printing Trades Association to testify on H.R. 2223, a bill for the general revision of the copyright laws

The International Allied Printing Trades Ass ciation is composed of the combined printing trades unions affiliated with the American Federation of Labor

and Congress of Industrial Organizations.

These Unions are. The International Typographical Union; The Graphic Arts International Union; The International Printing and Graphic Communications

The Graphic Arts International Union resulted from a merger of the Book-

binders, Photoengravers and the Lithographers Unions.

The International Printing and Graphic Communications Union formerly con sisted of the Printing Pressmen and the Stereotypers and Electrotypers Unions.

The combined membership of these unions is upward of 375,000.

Since the last general copyright law revision in 1909 these unions have supported, first the inclusion and, second, the retention of the so-called Manufacturing Clause of our Copyright law. In the sixty-six years since that time the Clause (embodied in Chapter 6, Section 601 of H.R. 2223) has been modified only marginally.

We believe that it should be retained as it stands in H.R. 2223, unmodified. The original purpose of the Clause itself remains unchanged. Numerous assaults have been made against it over the years but it has stood the test of time. It is not necessary here to spell out the meaning of the Clause other than to say that with a reasonable exception all books of nondramatic literary material, authored by an American national, printed in the English language must, in order to enjoy copyright protection in this country, be manufactured in this country. The exception is that of 2,000 copies to permit testing the market,

The reason for this requirement is the maintenance of employment in this country at levels of compensation and under working conditions that are in keeping with the standard of living achieved here and maintained over the years.

Until recently foreign wage levels have remained at levels far below those

prevailing in this country, including the printing trades.

While during the recent world-wide inflationary period foreign wages have risen, the narrowing of the wage differential may be temporary. It is still quite wide. In any event imports of printed matter by this country has increased from \$97.2 million in 1966 to \$271.8 million in 1974. This represents a near tripling of imports.

Some of this sharp increase may be attributable to the removal of our duty on books under the Florence Convention which was negotiated under the auspices of UNESCO (United Nations Educational, Scientific and Cultural Organization) and ratified by the Senate. It took effect in 1966.

Opposition to the Manufacturing Clause is often based on the simplistic objection that it is protectionist. However, a copyright is itself protectionist in the sense that it bestows a monopoly on the author. That purpose is contained in Section 8, Article I of our Constitution. The purpose is "to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".

The Universal Copyright Convention extends copyright privileges in this country to foreign publishers but does not preclude this country's setting forth the conditions under which the monopoly privilege may be enjoyed. Foreign authors are not excluded from the enjoyment of copyright in this country. They must merely conform to the conditions that will place them on the same plane as American authors.

The importation of books (free of duty) has increased from \$48,000,000 in 1967 to \$125,000,000 in 1974. They are included in the more general classification of printed matter and represent nearly a half of the total as recited in a preceding paragraph.

With importation free of duty the principal inducement to manufacture books abroad, as indicated above, lies in generally lower wages prevailing in many foreign countries. Of principal concern to the printing trades in this country are possible sources of cheap labor such as still prevail in the Far East and across our borders in Mexico.

Wage comparisons admittedly leave much to be desired if the purpose is to stermine comparative costs of production. Rates of wages must be translated arough exchange rates, and when these fluctuate as they have in recent times we encounter considerable difficulty in arriving at satisfactory comparisons. Moreover productivity, which is to say, output per man-hour, varies considerably from country to country. The so-called fringe benefits may also vary from country to country.

Yet when all this has been said two other considerations will contribute to the relevance of comparative wage rates. In recent years productivity in other industrial countries has advanced quite sharply. The United States no longer enjoys the great lead in this respect that was formerly her advantage. The higher wages here went hand-in-hand in many instances with higher output per man-hour. Modern technology, including that of the printing industry, is now quite widely diffused.

Secondly, the wage differentials between the American printing industry and the foreign are in some instances still very wide, especially so far as countries of the Far East are concerned, as well as Latin America.

In the United States the average gross earnings of production or nonsupervisory workers in the manufacture of books, was \$161.93 per week in 1973, or \$4.11 per hour. (Bureau of Labor Statistics, U.S. Department of Labor, March 1974). There were, of course, higher rates as well as lower ones. The average pay of compositors hand or machine, ranged from \$5.52 per hour in Atlanta to \$8.10 in New York in October 1973. Bookbinders (machine sewing) in the same centers received an average pay from \$4.15 to \$4.53 in Atlanta and San Francisco, respectively, for females; from \$5.78 to \$7.39 in New York for males. Press operators ranged from \$5.52 to \$8.10 in Atlanta and New York, respectively.

In Mexico machine or hand compositors (adults) earned 93.6 cents per hour in 1973. Press operators, rotary or flat, received an average of \$1.07 per hour. Unskilled workers earned only 66.6 cents per hour. (Source: Bulletin of Labour Statistics, 2nd quarter, 1974. International Labor Office, Geneva).

Here we see a strong contrast with the earnings in this country. The differential is over 4 to 1 in the United States in relation to the level in Mexico.

In Hong Kong for hand compositors the hourly wages were 68 cents per hour in 1973 while machine compositors received an average of 91 cents. Flookbinders received from 49 cents to 60 cents depending on whether they were female or male. Press operators received an average of 71 cents. (Source: same as for Mexican wages).

Taiwanese earnings are given on a monthly basis. In 1973 the monthly earnings in Taiwan in the printing industry ranged upward from \$79.96 in May to \$89.60 in November (the conversion from the Taiwanese dollar to the U.S. dollar made at rate of \$8.33 to 1 U.S. dollar). Typesetting and bookbinding rates ranged from \$60.18 in April to \$64.17 in December 1973.

The monthly hours from which these rates were derived were generally in the range of 230 to 250 hours. If the monthly rates as shown in the preceding paragraph are reduced to hourly rates, their low level becomes glaringly obvious. An \$80 per month rate drops to the low level of 34 cents if converted to an hourly rate, assuming the number of hours worked per month was 230 or some 53 hours per week. If 250 hours are used as a base, the hourly rate drops to 32 cents. (Source: Monthly Bulletin of Labor Statistics, June 1974. Executive Yuan, China). Additional compensation in all manufacturing (including printing) is estimated to be 15-20% in Taiwan. This addition would, however, not affect the differential between U.S. and Taiwanese wages significantly.

Korean wages are reported on a monthly basis, based on "regular employees." In printing and publishing the rate is shown as \$74.90 per month for 1973. The number of days worked averaged 25.3 per month. The daily average rate was therefore \$2.96, or about 33 cents per hour. By 1975 the pay had risen to \$105 per month or \$4.32 per day. This would represent some 48 cents per hour. (Source Monthly Statistics of Korea, June 1975, Economic Planning Board, Korea.) The conversion from the Korean won has been made at the rate of 398 won per \$1.U.S. for 1973.

The report states that an addition from 25-30 percent should be made to the wage rates as reported. However, such an adjustment would still leave the hourly rate of 1973 which was calculated at 33 cents no higher than about 42 cents. The 1975 rate would be lifted to about 61 cents per hour.

cents. The 1975 rate would be lifted to about 61 cents per hour.

The areas of such low wages are potential sources for the development of book-printing at low cost. Books so printed could enjoy copyright protection in this country under Universal Copyright Convention. The maintenance of the conditions now in effect in the form of the Manufacturing Clause, assuring manufacture in this country as a condition precedent to the enjoyment of a monopoly in this market, is both legally justified and fair as a quid pro quo to enjoyment of our market, particularly since the duty on imports has already been removed.

European wages in the printing trades, though varying substantially among some of the countries, are well above those prevailing in the Far East and Mexico.

France and Britain are on the low side. According to the publication, "International Graphic Federation Journal," the standard rates of pay per week for skilled labor in the printing trades were at the level of \$62-\$64 in Britain, for typographers, lithographers and gravure printers, in 1974. Conversion was at \$2.36 to the £. The French rates ranged from \$83 to \$89, while bookbinders and packagers were at the lower level of \$55 per week. The American rate for bookbinders was \$150 while the rate for lithographers was \$212 and that of gravure printers was \$269.

Both West Germany and Beigium had higher weekly rates. The Belgian rates ranged from \$103 for packaging and \$120 for bookbinding to \$140 for newspaper offices. From 9% to 14% should be added. Typographers, for example, not \$124 received an additional 121% havinging them to shout \$140.

at \$124 received an additional 121/2% bringing them to about \$140.

West German rates ranged from \$126, average for all trades, to \$142 for machine compositors, the highest. Bookbinders, in the highest age and wage

group were paid \$122.

The highest European vages in the printing trades were paid in Norway, Sweden and Switzerland. The Norwegian rates ranged from \$143 per week for packaging to \$191 for lithographers. The Swedish rates ranged from \$119 for bookbinders and packaging to \$176 for skilled typographers. Lithographers and gravure printers received \$175. The Swiss rates ranged from \$169 for packaging to \$212 for machine compositors. American rates, however, were still above even the Swiss rates, the highest in Europe, in some of the trades.

While some European countries are much nearer to our level of wages than those of the Far East, they nevertheless still leave a considerable gap. What applies to the Far East and Mexico is therefore also applicable to Europe with respect to retention of the Manufacturing Clause, albeit with somewhat lesser force.

Mr. Kastenmeier. Our next witness is Mr. Gerhard Van Arkel, general counsel, International Typographical Union. Mr. Van Arkel

has an extensive statement with materials appended to it, which will be received and accepted and printed in full in the record.

[The statement of Gerhard Van Arkel follows:]

BEFORE THE HOUSE JUDICIARY COMMITTEE; SUBCOMMITTEE ON COPYRIGHT

I have previously testified before this Subcommittee. I have re-read my earlier testimony and statement on the subject of the manufacturing clause, and believe that no major changes or additions are required. I have therefore taken the liberty of resubmitting my earlier testimony and statement as my statement to the Subcommittee on this series of hearings.

Respectfully,

GERHARD P. VAN ARKEL.

COPYRIGHT LAW REVISION

House of Representatives, · SUBCOMMITTEE No. 3 OF THE COMMITTEE ON THE JUDICIARY, August 12, 1965, Washington, D.C.

STATEMENT OF GERHARD VAN ARKEL, GENERAL COUNSEL, INTERNATIONAL TYPO-GRAPHICAL UNION, ACCOMPANIED BY JOE BAILEY, VICE PRESIDENT, INTERNATIONAL TYPOGRAPHICAL UNION

Mr. Van Arkel. Mr. Chairman and members of the committee, my name is Gerhard Van Arkel, of the firm of Van Arkel & Kaiser, Washington, D.C. I represent here the International Typographical Union, AFL-CIO, which has long been interested in this subject matter, in support of the Register's recommendation that a manufacturing clause be continued in our copyright law.

With me is Mr. Joe Bailey, a vice president of the International Typographical Union, who does not plan to testify but who will be available to answer any

questions which the subcommittee may wish to put to him.

I have submitted to the committee a statement setting forth our position on the issues which are involved in this matter. I shall try to summarize, in my presentation here, and I shall try to do it somewhat more briefly than Mr. Frase did yesterday on behalf of the publishers. I hope the members of the committee will understand that I do this out of respect for the time pressures that I know are on this committee, and not because I could not, if I chose, talk as long as Mr. Frase or because we are less interested in this subject matter than he is.

I would strongly urge that in considering this problem the thought that should be uppermost in your minds is that we are not talking about free trade. Insofar as the American market today is concerned, there is free trade in books. There is a purely nominal tariff of 3 or 7 percent only. There is no other restriction of any kind imposed by statute, regulation, or otherwise which restricts, in any respect, the number of books that any person, or the type of book which any person, American or foreign, can import into the United States. We have thus absolutely free trade in books.

You gentlemen have been considering amending the copyright law, and witness after witness who has appeared before your committee has stressed the obvious fact that the grant of a copyright is the grant of a monopoly.

Now I do not have to develop the thesis that monopoly and free trade are at

the opposite ends of the pole, and that they are not reconcilable.

Our position here is that foreign manufacturers should have the right, which they now have, to have their work performed anywhere in the world by that labor which is most exploited and works under the most degraded conditions, and to import that product into this country without restriction.

As I say, that right they now enjoy. Or that they can by American law exclude American manufacturers from the American domestic market under certain

reasonable conditions.

But we object to their being granted both this unlimited right of importation

and an unlimited monopoly of the American market at the end, of it.

I suggest to the committee that there are only two questions properly before you. The first is, may the Congress impose reasonable conditions on the grant of copyright? The second is, is the manufa wring clause a reasonable condition? Now the first of those need not detain us. Your whole hearings have been directed to the question what kind of conditions should be imposed on the grant of copyright. Who may have a copyright, what does the copyright extend to, who is the infringer, and all the rest of it. This we think is in line with the constitutional power granted to Congress in this field.

Now as to the second question, whether or not the manufacturing clause is a reasonable requirement, about 15 years ago the Honorable Sam Bass Warner, who had been a Register of Copyrights and who was a stanch defender of the manufacturing clause, did a very perceptive study of this clause and its origins.

He found that at its inception this clause was exactly what we assert it now to be. That is to say, at that time it was an entirely acceptable condition imposed on the grant of a very much desired privilege; namely, the right to have a monopoly of the American market. As he pointed out, this was the method that the Congress adopted to reconcile the interests of the British in obtaining copyright in the United States and the desire of the American public to have English editions under reasonable conditions.

Prior to that time, as has been pointed out, there was no protection for foreign nationals in this country and there was no protection for American authors in England. The result was that English titles were pirated in this country generously and that American titles were pirated in Great Britain.

A rood-bit of the corness that was shown by the witnesses resterday about the call practices, if I can call them that, of American publishers in pirating should be shown by the witnesses resterday about the should be
So that the grant of copyright accompanied by the manufacturing clause was the method which the Congress and all other interests chose to impose as a condition on the grant of this very much desired privilege in the United States.

It is, of course, difficult to compare wage rates in different countries. In my statement I have made an effort to do so. On page 4 Mr. Fuchs points out that I neglected to say in the statement that the wage rates there referred to are wage rates of printing trade workers abroad. But those comparisons show that the country which most nearly approximates our wage rates, which is Sweden, has an average wage rate of less than half of ours. I should have mentioned Canada, whose rates are approximately equal to ours.

The lowest of them, Belgian women, is only about a tenth of our wage rates. I have not been able to obtain statistics, but we know that wage rates in the Far East and in large parts of South America are below even these levels.

So this points up the glaring discrepancies between wage rates abroad and in this country and it illustrates, I think, our basic point that we should not create a condition in which work can be done under the most degraded working conditions anywhere in the world and still have unlimited entry into the United States and a right to exclude American manufacturers from our domestic market as a consequence. *

Now we have made certain points in this statement which I should like to discuss briefly.

In the first place, we would welcome a provision which would exempt Canada particularly from the manufacturing clause. This has a bearing on a good bit of the testimony that was given yesterday, where it was pointed out that there is a lot of friction with the Canadians, and we think that where wage rates are comparable, as they are between Canada and the United States, that there ought to be some provision made, we suggest by way of a Presidential finding, that if another country has wage rates comparable to ours then the provision of the manufacturing clause should not apply.

This is particularly significant if you consider the export figures and import figures which Mr. Frase presented to you yesterday. Those figures show an excess of exports from the United States over imports, but about 45 percent of our exports go to Canada, and we import practically nothing from Canada.

So that if you take the Canadian figures out of the statistics that Mr. Frase presented to you vesterday, they make a far less one-sided picture than the statistics which he produced would make it appear.

By the same token, almost 40 percent of our imports are from Great Britain so that, insofar as Great Britain is concerned, there is hardly any inequality whatsoever.

I would just like to add that our concern is not with fair competition. If wage rates are approximately equal in another country, we are confident that American manufacturers and American workers can get along with them. But we think that this is a desirable change to make with respect to the manufacturing clause.

We are troubled by the proposal which the Register of Copyrights makes to increase the number of copies from 1,500 to 3,500 that may be imported into this country. This makes it necessary for me to go back into a little more history. The original Copyright Act of 1891, which granted for the first time copyright protection to foreigners in this country, was carried forward with some tightening up in the act of 1909. In 1949 those requirements were, we think, very generously lightened insofar as foreign interests are concerned. The number of books that might be imported was increased from 1 to 1,500. The length of time within which registration was required was increased from 60 days to 6 months, and the period of time in which publication in this country was required was increased from 6 months to 5 years.

The unions at that time supported these amendments. They were based on the simple theory that this would enable the foreign manufacturers to test the American market in order to determine whether or not the publication of an

American edition was feasible.

Those we thought at the time were generous concessions to the interests of

foreign manufacturers, and we still think that they were.

Now I have not heard from any source any complaint that this number of 1,500 was inadequate for the purposes of testing the market. We recognize, however, that the market has grown. We, therefore, would not object to some modest increase. But the proposal to increase it substantially over 100 percent seems to us misguided, and we believe that no basis has been shown to justify that dramatic increase in the number of copies that might be imported.

Now I would like to say a word about the problem of reproduction proofs which was gone into at some length here yesterday. For the members of the committee who were not here, I should state that this problem arises from the fact that in our interpretation the present law requires that in order to meet the conditions of the manufacturing clause, all the work has to be done in this

Under new methods of printing which have been developed, it is now entirely feasible, however, to have type set abroad and, instead of importing type into the United States, to import into it what I shall call "reproduction proofs"though this covers a multitude of processes, including such things as computer tapes, paper reproductions, and so forth.

Instead of importing the type, however, it is easy enough to put on a jet plane a small package containing the reproduction proofs of the type and to

introduce them into this country.

Now some publishers have taken the position that under present law this practice is lawful. We assert that it is not; that is to say, that loss of copyright follows from the adoption of this practice. We have not been able to bring this to a judicial determination because we have no standing to sue in court. The penalty that is involved, the loss of copyright, is not one that can be directed at us because we do not hold any copyright.

We are confident, however, that the matter will be judicially resolved before too long. Mr. Frase yesterday objected that the Congress should not adopt this proposal because it is indefinite, because the Register of Copyright admits he does not know what the present statute means. But I put it to you that daily Congress adopts statutes of which they do not know the precise meaning. You adopt a statute saying that a utility must charge reasonable rates, that a certain transaction must take place in good faith, that a certain act must be done within a reasonable time.

There is nothing new or different about the Congress leaving to the courts the job of interpreting statutory language, which is in substance what the Register of

Copyrights proposes be done here.

The mere fact that the language may have some ambiguities—we insist there is no ambiguity—that the present statute clearly outlaws this practice, we think this is no valid reason why the Congress should not leave this matter to later judicial determination, and we are confident what the outcome of such litigation would be.

Now I shall only briefly mention the fact that, while we have our types of violent disagreement with the publishers, we do support their position on fair use. We think that the copyright law should not be repealed in effect by granting a right to any person to make as many copies by whatever means he chooses of a copyrighted work.

If I could, I would like to make a few comments about the testimony you heard

here yesterday.

As I understood the thrust of the testimony yesterday, it was directed at two points. The first is that the repeal of the manufacturing clause would not make a bit of difference to anybody. We were told that British book manufacturers had said they didn't care whether it remained on the books or was repealed. We were told this could not affect the interests of the printing trades workers or the American manufacturers.

In short, one was left with the impression that the committee was wasting its time in considering this subject matter because it made no difference to anybody.

On the other hand, we were assured that the retention of the manufacturing clause was stifling scholarship, that it was crippling the publishing industry, that it was a horrendous offense against morals and against society. We were told that the publishers did not object practically, they merely objected in principle to the manufacturing clause.

As Senator Jim Watson, of Indiana, used to be fond of saying, "There are times when every politician must rise above principle," and this is one case where the publishers have in fact risen above principle. I think they don't care any more about money than I do about my right eye. I think that quite clearly their effort is to have the opportunity to search around the world to find where the work can be done most cheaply and hence most profitably to them.

But I think, of particular significance, Mr. Frase, in testifying for the book publishers, did a little boasting about how right he was in 1954 when he stated that the repeal of the manufacturing clause as to works produced by foreign authors in the English language would have no effect on the market, and he rather intimated that we were very stupid at that time in thinking that it might make a difference.

He had a lot of statistics to prove how right he was and how wrong we were. Now I do not know whether you have copies of his statement, but if you will look at page 19, there appears there a table which shows the comparative volume of trade books in English, imported and manufactured in the United States in 1953, 1958, and 1964.

If you will look at the column headed "Percent of total copies," the 1954 amendment applied, as I have stated, only to books in English of foreign authorship. If you look on the first line under "Imported," you will see that in 1953 the percentage is 1.8 percent. That in 1958 it was 3.5 percent, or just about 100 percent more. That in 1964 it was 4.8 percent. That is, in a period of less than 10 years there has been a 250-percent rise, approximately, in the number of books

of foreign authorship in English imported into this country.

I will leave it to the members of this committee to say whether or not a 250-percent increase is or is not a dramatic increase and whether or not those figures support Mr. Frase's contention that the repeal of this clause in this respect would make no difference or whether they support our contention, made at that time,

that it could and would have an economic impact.

What I have not done, but perhaps some attention ought to be given to it, the percentage of books in English by foreign authors is, as these figures show, a relatively small percentage of the total books manufactured and imported into the United States. But if you take a rise of 250 percent in less than 10 years or of about 25 percent a year, extrapolate that over another 10 or 20 years, you will get to some really dramatic figures. And if you apply those same percentages, then, to the total book manufacturing industry in the United States which would, of course, be affected by the total repeal of the clause, then I think you will see some very dramatic impact indeed on the American book manufacturing industry.

So that we insist that Mr. Frase's figures, far from supporting his assertion that the manufacturing clause will make no difference, are clearly belied by the figures that he himself has produced and that his accuracy as a prophet can be highly questioned in the light of the kind of testimony which he gave in 1954

which he repeated here yesterday.

Now we were also told yesterday that we are stifling scholarship by asking for the retention of the manufacturing clause. Now, cross my heart and hope to die, I an not against scholarship, and neither is the ITU. We are all for it. You will recall in the testimony you have heard about the way in which publishers are stifling scholarship because of their insistence on fair use provisions in the copyright laws. That scholarship ought to be assisted by giving an unlimited right of copying.

You have heard the publishers' anguished reply that they should not be asked to subsidize scholarship by giving them free books, that libraries and scholars

and universities and so forth ought to pay the full price of their books.

Now we will accept that argument. We say by the same token that printing trades workers in the United States should not be asked to subsidize scholarship. I suppose there would be a great increase in the printing of scholarly works if the printers in the United States would agree to set them for nothing or even if you cut the wages of printing workers in the United States in half, this would

probably increase the amount of scholarly printing.

No one that I know of has proposed that that be done. I don't know how it is in other fields, but in the particular field in which I am interested, labor relations, I would say that a good half of the so-called scholarly works that come across my desk are pure, anadulterated junk which should never have seen the light of day. They are long, tedious studies devoted to proving the obvious, done I think frequently by young persons solely because they think that with an M.A. or a Ph. D. they will get a somewhat higher salary in the teaching profession.

Be that as it may, I would like to point out that last fall I was taken on a tour of the Princeton University Library. I was most impressed by two things. One, by the extraordinarily high percentage of books in that very busy library which had never in the long history of the library been taken out by anyone. They

simply sat there on the shelves.

No. 2, by the fantastic problems they were having in simply finding physical

space to store the books that were coming off the presses.

So I think that there is another side to this business that we ought to have an unlimited right of any person who says he is a scholar to put his work in print, and particularly to do it at the expense of American printing trades workers.

Yesterday you heard a great deal of testimony about how the printing industry in the United States had grown, about how much our exports exceeded our imports, about I believe 21 new university presses having been established in the last 10 years, generally about the very healthy state of the industry.

What no witness mentioned, however, in giving these figures, was that all of these results had been achieved with the manufacturing clause on the books. Mr. Frase's statistics clone demonstrate how very hazardous it is to say that conditions will continue to be the same if this clause is repealed. If I cannot prove that the enormous increase in the importation of foreign authors writing in English is due to the repeal of the manufacturing clause, Mr. Frase cannot demonstrate that it is despite that either.

By the same token, if this clause is repealed, I am confident that you will be accomplishing a substantial revolution in this industry which may have substantially adverse effects on our international position as well as on our domestic market. If these desirable results have been achieved in the printing industry, to the extent that they are due to the skill and competence of our members we

are of course proud of them.

I earlier stated we do not fear fair competition but we do think that the effort of this committee ought to be by the kind of amendment I have suggested—to pull the wages of foreign printing trades workers up to our level rather than to give foreign manufacturers a bonus in the form of a monopoly of the American

market because they have degraded working conditions.

In short, the kind of amendment I have proposed here, which would relieve the importer of the manufacturing clause if they were produced under substantially similar conditions to ours, would manifestly give the foreign industry an incentive to raise their living standards to ours rather than, as I have said, a bonus for maintaining the exploitive conditions which are prevalent in this industry in many other parts of the world.

I am grateful for this opportunity to appear before the committee. I thank

you for the patience with which you have heard me out.

Mr. KASTENMEIER. Thank you, Mr. Van Arkel.

I think we are familiar with the fact that there has been an effort made among various interests on this question of the manufacturing clause in the revision bill to see whether the differences could not be reconciled. I gather they have not. When I asked Mr. Frase yesterday about the state of this, he said that they largely fell down on the question of reproduction proofs.

I wonder if you could confirm that or whether you have a different view of

the state of negotiations among the various interests on this question.

Mr. Van Arken I would say in answer to that, Mr. Chairman, that I have no doubts about what the publishers strategy has been and it seemed to me that they were confirmed by everything that Mr. Frase said yesterday. They have

long sought the entire repeal of this clause. What they have in practice done with some success has been to try to whittle it down. Their present effort is to whittle it down to take typesetting out of the manufacturing clause. This for the obvious reason that this is the particular part of the operation which it is now

most feasible to perform abroad.

Insofar as presswork and binding is concerned, there still is a problem because of distance insofar as competition is concerned. There is substantially none insofar as typesetting is concerned. With a jet airplane you can get copy from New York to the Netherlands as fast as you can get it from New York to Chicago. The problem of shipping is nonexistent because you put some reproduction proofs in an envelope and bring it in.

The publishers' present obvious objective is to cut this particular part out of the manufacturing clause. In the first place, we say that this is a dilution of

the entire clause of a kind that should not be tolerated.

Second, we are utterly confident in our own mind that if the Congress adopts that, that in 5 years or 10 years when transportation has become cheaper, when larger jet planes make the import of books easier, that the publishers will be a ck here again saying now you have to exclude binding and presswork and so forth. In short, their whole objective has been to whittle this clause down until it no longer exists. It was this that they insisted on as a condition of any agreement, and it was this that all of the allied printing trades, understanding what was up, refused to accept.

Mr. Kastenmeier. Mr. Van Arkel, the ITU is a member of the Allied Printing

Trades Association?

Mr. VAN ARKEL. Yes, we are.

Mr. KASTENMEIEB. Represented by Mr. Strackbein who testified yesterday?

Mr. VAN ARKEL. Yes, we are.

Mr. KASTENMETER. Do you not consider that 601 and chapter 6 in its present

state is a whittling down of the manufacturing clause?

Mr. Van Arkel. In one important respect we think it is, Mr. Chairman. This is one that we do not object to. It seems to me that the most important change that the Register has proposed in the clause is that violation of the clause shall not entail a complete abandonment of copyright. That is to say, insofar as movie rights, and so forth, are concerned, even if a work is produced in violation of the manufacturing clause the author would continue to have those rights.

We agree with that recommendation and we welcome, indeed, this additional protection for American authors. It has no relevance to our concern, and therefore we think it is a perfectly fair amendment to protect the interests of Amer-

ican authors and others.

Now as to other changes in it, it is true that there are certain other changes but we have not raised objection to them in our statement and they are keeply, we feel, of a technical nature that do not prejudice what we feel to be our

essential position.

I would like to say, however, that I had just a moment to glance at the statement of Mr. French this morning with respect to the recommendations of the BMI for revision of the copyright law, and I agree very strongly with the recommendations that Mr. French makes in this statement for the Book Manufacturers Institute. I have to say that I scanned it hurriedly, so I may have to come back to you and say I disagree with something. But insofar as I have looked it over, I agree strongly with his proposed amendments.

Mr. Kastenmeier. Do I understand your position really to be that you would approve of chapter 6 as it now stands, you would prefer to exempt Canada from the manufacturing clause, which would be a concession, and you would change the figures in terms of number of permitted volumes for any single edition?

Mr. VAN ARKEL. That is right.

Mr. KASTENMEIER. And you would change some language with reference to

reproduction proofs?

Mr. VAN ARKEL. No, with respect to that issue, Mr. Chairman, I would be less than candid if I did not say that we would support the position which other witnesses have taken before the committee that if the Congress deemed it wise, it would be desirable to clarify the language to make it clear that reproduction proofs are covered within the manufacturing clause.

However, failing such an amendment, we are content with the proposal which the Register has made on this subject matter which is essentially to leave the law as it is, leave it to a later judicial determination as to whether reproduction proofs are or are not covered. I say that because of our confidence that our

position is correct that reproduction proofs are covered by present statutory language.

Mr. Poff. Would the chairman yield?

Mr. Kastenmeier. Yes, I yield.

Mr. Poff. I would like to clarify your answer to one of the chairman's questions. Am I correct, or not, that you use Canada only as an example of a country that might be exempted from the manufacturing clause?

Mr. Van Arkel. Yes.

Mr. Poff. You propose an amendment that would give the Executive the discretion to grant exemptions in those areas where the wage level is comparable to that in the United States?

Mr. Van Arkel: That is right.

Mr. Poff. Certainly this would apply to Canada?

Mr. VAN ARKEL. That is right.

Mr. Porr. And likely not elsewhere?.

Mr. Van Abkel. I don't know any other place. There may be other places. I have not examined statistics. Of course, you are quite right, Mr. Congressman, I thank you for pointing it out, that we are not asking for legislation with respect to Canada. We think its practical impact, as of this time, would be limited to Canada. But we say if you will adopt an amendment saying that countries with comparable wage conditions shall be exempted from the manufacturing clause, then, obviously, it gives other foreign countries an incentive to lift their wage rates to the level that we enjoy in this country. This, we think, is desirable internal and international policy.

Mr. Poff. I ask your pardon, but I wanted that point to be clear, and I am sure

the witness did, too.

Mr. VAN ARKEL. I am grateful you asked that.

Mr. KASTENMEIER. Is it not true that wage rates for all commodities differ

throughout the world from the standards set by the United States?

Mr. VAN ARKFL. I wish I could give a more definite answer to that question, Mr. Jongressmau. I simply have not compared wage rates in any area other than the printing trades.

Mr. KASTENMEGER. Would it not be your belief?

Mr. Van Arkel. I assume that is probably true. But I also point out that there are few other commodities that can be shipped in an envelope, that is, where you have had important amounts of work done, work which is expensive to do, which takes a long time to do, which you can put in an envelope and put on a jet airplane and have in this country within a matter of a few hours.

If you are talking about sewing machines, bicycles, steel, or any other commodity, you have to absorb substantial costs of shipment; you have the problem of delays in shipment and all the rest. These are missing, particularly in the area of

typesetting and of reproduction proofs.

Mr. KASTENMEIER. Actually, this is a clause for the protection of the American

printing industry, is it not?

Mr. VAN ARKEL. Well, Mr. Chairman, I would like to repeat that the origins of this clause show very clearly that it was not a protective device. It was a condition attached to a domestic privilege and it was done with the consent of all the parties who were interested at that time.

Now it is true that this thing has been phrased in terms of free trade against protectionism. I think that is an entirely wrong way to look at it. I insist once more that we are talking about excluding American manufacturers by American law from the American domestic market, and that this is not a question of protectionism or free trade, this is a question of a desirable way to handle copyright

tionism or free trade, this is a question of a desirable way to handle copyright. We are constantly told that the manufacturing clause has nothing to do with copyright, that it has no place in the copyright law. It is obvious that it has the most intimate relationship to American domestic copyright. There is a question whether or not it is an appropriate condition to impose on the grant of an exclusive monopoly in the United States.

Mr. KASTENMEIER. Is it true as the witness stated yesterday that the United States is the only country that has a manufacturing clause in its copyright law?

Mr. VAN ARKEL. I would like to say a word about that. I have gone into that in my statement, Mr. Chairman. Practically every country in the world except the United States, in the patent field, has what is called a working requirement, including England. Under the working requirement, unless you manufacture in the country granting the patent, you lose your patent right. If you will look at Mr. Warner's statement, there appears to be reason to believe that this was

the antecedent of the manufacturing clause in this country in the copyright field.

Now I have heard of no American activity to remove the working requirement from British law as an exclusionary device directed against American manufacturers, and I would regard it as a highly questionable intrusion into domestic British affairs for Americans to take any such action. I think this is an appropriate requirement for England to impose if it chooses.

Mr. Frase yesterday mentioned the fact that some 20 countries have become parties to the Florence Convention, thereby eliminating any tariffs on books. What he failed to state was that there are all kinds of ways of skinning a cat. France, for example, flatly forbids the importation of large quantities of books into its country. There is no point in talking about a tariff on goods that you are not allowed to ship into the country.

Mexico has the requirement that if you don't translate into Spanish within 3 years, you lose your copyright. Brazil and Portugal require licenses to import books and you have an awful time getting a license if your book is in Portuguese.

In short, any effort to portray us as kind of dogs in the manger who are excluding stuff, and other countries as generously permitting the importation,

of anything we want to send them, is entirely incorrect.

Many of them achieve it through currency controls, for example. Sure, you can get a copyright in the country, but if you try to exploit the copyright, you can't take your profits out of the country, which is of course a limitation on the copyright. We permit foreigners to exploit copyright here to take the profits out of the country. In short, to portray us as some kind of devils in this respect and other countries as completely free and easy is an entirely erroneous impression for anyone to leave.

Mr. Kastenmeier. Mr. St. Onge. Mr. St. Onge. No questions. Mr Kastenmeiep. Mr. Edwards? Mr. Edwards: No questions. Mr. Kastenmeier. Mr., Tenzer.

Mr. Tenzer. I have no questions because I did not hear yesterday's testimony. I would like to assure the witness that this committee will give a qualitative rather than a quantitative analysis to the testimony in accordance with your

Mr. VAN ARKEL. I am grateful for that thought.

Mr. Poff. Of course, following the sentiment my colleague has just expressed, it sometimes becomes necessary in evaluating qualitatively to consider the impact of certain quantities. That is the line my questions will take right now.

First, I will quote from the statement of the Register in order that you may

comment on it. He says:

"The 3,500-copy figure was suggested as the point, in the present book market, beyond which it is generally more costly for a publisher to import copies than to manufacture an edition here. As such it would be the equivalent of 1,500 copies in the market of 1949, when the statute was amended to provide a 1,500copy limit on importation."

Do you care to comment on that statement?

Mr. Van Arkel. Yes, I will be glad to, Mr. Congressman.

As I stated earlier, the 1949 amendments, which the printing trades unions supported, adopted a simple single test; namely, that foreign manufacturers ought to have the right to test the Amer' an market to determine whether or not it was economically feasible to bring out an American edition. Now I think it is obvious from the Register's own statement that he has departed from that standard. He is not now talking about what is required to test the American market. He is in effect converting that into a test of profitability of production in the United States. What he seems to me to be saying in that language that you quoted is that it is not economically feasible to prepare editions of less than 3,500 copies in the United States, and, therefore, we are going to grant this exclusive monopoly on editions of less than 3,500 copies of foreign manufacture.

Now we think that is a wrong standard. We think the standard ought to remain what it has been; namely, the testing of the market standard. I have stated that we have no objection, in view of the fact that the market is much larger now than it was in 1949, to a modest increase in that amount. But we say that to increase it

by substantially over 100 percent at one jump is totally unwarranted.

I repeat that I have not heard anyone say that the standard of 1,500 copies is insufficient for testing the market under present-day conditions. So that if you

adopt the standard which the Congress has historically used in dealing with this problem, I can see no justification whatsoever for a jump of over 100 percent.

Mr. Poff. Now, language has a habit of meaning one thing to one person and something else to another person.

Mr. VAN ARKEL. That is why Congressmen hold hearings.

Mr. Poff. Exactly. "Testing the market" means something to me, but I am not sure it means exactly what it should mean. Would you care to define that phrase?

Mr. VAN ARKEL. My understanding of the phrase, Congressman, is that prior to 1949 you could only bring in one copy of the work. Obviously with one copy you cannot determine what the reaction of the American market to that one book will be. However, what the foreign manufacturer may now do under present law is to bring in 1,500 books. He can put them on sale in, let us assume, 10 major bookstores. If they sell like hotcakes and are quickly exhausted, he knows that there is a demand in this country sufficient to warrant the publication of an American edition. If all 1,500 stand idly on the shelves for 5 years, he knows then that an American edition would be a waste of time and money. This, I say, was the inception of the clause. This, I think, is the appropriate ground on which it should be appraised. We think that, appraised by any such standard, that the 3,500 requirement is way over what anyone can demonstrate is the necessity of the situation.

Mr. Porr. Do you have any figures indicating the amount or the percentage in-

crease in the market since 1949?

Mr. Van Arkel. I am perfectly willing to accept the statements which appear, I believe Mr. Frase covers this in some of the tables attached to his presentation. On page 36 of this statement. Table 5: Growth of the U.S. Printing and Publishing Industry, he has the rates for 1947, 1954, 1958, and 1963. In the bookbinding and related industries—well, it has gone up about a 100 percent in that. In book publishing I note it has gone up even more than that.

Mr. Poff. I understand that the increase might be appropriately based on the

acknowledged fact that the market has expanded.

Mr. Van Arkel. I don't think that follows, Mr. Congressman. Mr. Poff. It does a recessarily follow in tandem.

Mr. VAN ARKEL to ret the foreign manufacturer wants, what he has under present law and was have no objection to, is the right to bring into this country a sufficient number of books to find out whether there is a popular demand for hem. Now that figure is not necessarily related to the total amount of book pull shing done in this country. It might have been necessary, for example, in 1820, when the book publishing industry was in its infancy in this country and production was very low, it might even then have been necessary to introduce 1,500 copies in order to test the market.

By the same token, in a very largely expanded market that may still be adequate. In any event, what I would like to see is debate focused untitat issue and not on the issue of what size edition is profitable for the American manufacturer to produce, as the Register in effect, it seems to me, in his comments suggests.

Mr. Poff. Do I also correctly understand that while you would favor the increase up to 2000 as a preference to the proposal to increase it to 3,500, you would

not make this the guiding criterion in the decision?

Mr. VAN ARKEL No. As I say, we have no objection to some modest increase in this. We recognize that the market is bigger, our country is more populous. It may well be that a case can be made out for the importation of an additional number of copies, but we think in one fell swoop to more than double it has not been shown to be necessary. We are fearful that this will mean that quite a number of editions will be published outside the United States which otherwise would be published here, and that therefore this major change in the law should not, at this time, be undertaken.

Mr. Poff. Thank you.

Mr. Kastenmeier. Thank you very much, Mr. Van Arkel. That was an excellent statement.

Mr. Van Abkel. Thank you, Mr. Chairman.

Mr. Kastenmeier. Also, Mr. Bailey.

Mr. BAILEY, Thank you.

Mr. Kastenmeier. I assume, Mr. Van Lekel, that you would like your text to be made part of the record?

Mr. VAN ARKEL. Emphatically, Mr. Chairman. There are a number of things I did not cover in my oral testimony.

Mr. Kastenmeter. The printed statement of Mr. Van Arkel will be made a part of the record.

[Mr. Van Arkel's prepared statement follows:]

STATEMENT OF GERHARD VAN ABKEL, GENERAL COUNSEL, INTERNATIONAL TYPOGRAPHICAL UNION

The International Typographical Union, with a membership of some 114,000, represents printers throughout the United States and Canada. It is affiliated with the International Allied Printing Trades Association, composed of unions in the graphic arts field, and with the AFL-CIO. Our purpose here is to support the provisions of section 601 of the proposed bills, the so-called manufacturing clause.

The history of this clause was carefully analyzed by the Honorabie Sam B. Warner, former Register of Copyrights, in a speech to the Book Makers Institute Convention in October 1951. He pointed out that the original Copyright Act of 1790 provided no protection whatever to foreigners, in this respect following British law. This led to complaints by American authors that they were discriminated against, since no royalties were paid British authors, and to whole-sale pirating of British titles by us and of American titles by the British. Mr. Warner noted that the manufacturing clause "was chosen as the way out of this dilemma of how to secure both royalties for English authors and cheap English rooks for American readers." It was first suggested by a group of Boston booksellers in 1838. (See memorial of the Book-sellers of Boston against the passage of the International copyright law, 25th Cong., 2d sess., H. Doc. 340.) It won gradual acceptance and was incorporated in the Copyright Act of 1891. Thereafter England also allowed our authors to copyright their works there; pirating ceased and all parties were protected. This principle was carried forward in the Copyright Act of 1909.

But foreign authors experienced some difficulty in obtaining copyright in this country. In 1949 the requirements were notably relaxed so that authors and book manufacturers might introduce into this country 1,500, rather than 1 copy; they were permitted 6 months rather than 60 days to register their book; and they were required to manufacture within the United States within 5 years rather than within 6 months. The union members of the International Allied Printing Trades Association, including the ITU, at that time supported these amendments. They were based on a simple theory; namely, that b, importing 1,500 copies, over a period of 5 years, foreign manufacturers would have an opportunity to test the American market to determine whether an American edition was desirable. We felt then, and we feel now, that these wer generous

concessions to the interest of foreign authors and manufacturers.

It should be borne in mind that there are presently large exemptions from the manufacturing clause; for books in other than the English language, for books in English by foreign authors, for the blind, and for others. The history of the clause thus shows that this was not some protectionist scheme dreamed up by greedy book manufacturer, and those representing their employees; it was a condition attached to a much-desired privilege, that is, copyright in this country for foreign authors and manufacturers.

Basic, we feel, to any discussion of the merits of this clause is the fact that it has nothing to do with free trade. There is today free trade in the import of books into the United States except for the pure y nominal 3 percent or 7 percent tariff, which it is proposed to abolish. There is no statute or any other restriction on the importation of books, except perhaps for such matters as libelous,

pornographic, or subversive writings.

This committee is considering copyright law. The whole point and ourpose of a copyright is to grant a monopoly. Those who advocate the elimination of the manufacturing clause seek both free trade and the grant of an unlimited monopoly, within the United States obtained, under the Universal Copyright Convention, by the mere act of printing a symbol on the work. Easing the requirements for obtaining a monopoly can hardly be described as a victory for free trad. Hence this problem is not to be settled by falsely portraying it as a battle between free traders and protectionist interests. The only valid questions before this committee are whether American law properly may impose conditions on the grant of nonopoly, and if it may, what conditions are proper.

As to the first question, the answer admits of no doubt. The congressional power in this area stems from section 8, article I, of the Constitution, granting the Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Manifestly, this must mean to promote the progress of the useful arts within the United States; it is hardly

to be supposed that the framers of the Constitution were concerned with their promotion abroad. Thus we say that the Constitution not only permits, but requires, the Congress to exercise its power in the American interest and thus enables it to impose such conditions on the grant of these monopolies as it deems wise.

The second question is whether the manufacturing clause is a reasonable and desirable limitation on such a monopoly grant. We assert that it is. It rather obviously rests on the premise that the foreign manufacturer shall be subject to the competition of the American book manufacturer on an equal and non-discriminatory basis, without the grant of a monopoly; or, if he wishes a monopoly, that he must publish the excess over 1,500 copies in this country, within 5 years—hardly onerous conditions. Insofar as competition in this field is concerned, the foreign manufacturer, as we show subsequently, has a sometimes spectacular advantage over his American competitor in the lower wages he pays. We assert that foreign manufacturers ought to have the right, which they now have, to shop around the world to find where their work can be done under the most degrading standards, or the right to a monopoly in this country, but not both. As I have pointed out, the advocates of repeal of this clause seek

free trade with a monopoly at the end of it.

It is of course difficult, if not impossible, to obtain completely accurate comparisons of wages as between different countries; such matters as fringe benefits. currency changes, differing work weeks and the like may somewhat distort any calculations. But these minor variations cannot conceal the vast discrepancies between United States and foreign wage rates. In 1963, we calculate that the average wage of the ITU members in the United States was at an hourly rate of about \$3.50 with a daily rate of about \$27. In Belgium, the 1964 ILO Yearbook of Labor Statistics shows it was about \$0.75 per hour for men and \$0.38 for women; in Denmark, about \$1.30 for men and less than \$1 for women; in France, less than \$1 for men; in West Germany, about \$1.10 for men and \$0.60 for women; in Italy, about \$0.70 for men; in Luxembourg, about \$0.80 for men; in the Netherlands, about \$0.77 for men; in Norway, about \$1.25 for men and \$0.85 for women; in Sweden, about \$1.50 for men and \$1.10 for women; in the United Kingdom, about \$1.16 for men and \$0.80 for women. These figures are roughly computed on average hourly or weekly rates without considering fringe benefits which are substantial in all countries, including the United States; for example, we believe that there would be a still wider variation if earnings at overtime rates in the United States were included in the computation. But the highest wage rate, that in Sweden, is less than half the U.S. rate, and the lowest, that of Belgian women, is only a little more than a tenth. We have not even attempted to compute the rates for Japan and other Far East countries, or for South America but believe that they are substantially below even these figures. Nor is there any reason for believing that present figures are materially different from those of 1963, the latest year for which statistics are available.

The importance of these discrepancies ought to be considered in the light of other developments in the industry. One of the more important is the development of the jet airpiane, which makes it possible to get copy from the United States to foreign countries about as quickly as from New York to New Haven. The other is the technological revolution which has been going on in the industry, including principally computers and photographic typesetting and a host of associated devices, which make it entirely feasible to perform work abroad which, for technical reasons, could not be handled there within even comparatively recent years. In short, distance is no longer an equalizer of competition to any

significant degree, and is steadily becoming less so.

We are heartened by the fact that the Register of Copyrights has recommended the inclusion of section 601, retaining the basic principle of this legislation. As he notes at page 144 of part 6 of his Report on Copyright Revision, "the manufacturing requirements would be much more limited in scope than those of the present law." The principal change, we feel, is one, to which we do not object, that violation of the clause should not deprive copyright owners of rights, such as performing, dramatization, motion picture rights, and the like which are not related to the reproduction and distribution of copies. These other rights are foreign to our interest, and we welcome this degree of protection for authors and other interests. While we could discuss the many changes proposed at considerable length, we shall confine ourselves to three points.

First, we would urge that provisions be included to exempt from the operation of the clause works produced in a country where wage standards are substan-

tially comparable to those of the United States. We think immediately of Canada; there may be others, and if in the future other countries approach our standards they too should be exempted. Our whole concern is that competition should be on a fair basis, and not to see which country can starve its printing trades workers the quickest. Where equal, or approximately equal, conditions prevail we are confident that American manufacturers and their employees can meet such competition. But we do not believe that foreign nationals should have the right to take advantage of the most exploited group of workers to be found, and also be granted a monopoly of the American market. One or the other, but not both.

Second, we are troubled by the proposed increase in the number of permissible copies to be imported from 1,500 to 3,500. This is a jump of over 100 percent. The only explanation of this proposal we have seen is to be found at page 145 of part 6 that "this figure was suggested as the point, in the present book market, beyond which it is generally more costly for a publisher to import copies than to manufacture an edition here." We are not told by whom this was suggested, or the data on which it is based. The criterion used seems to us a departure from previous approaches to this problem, which were based on giving foreign manufacturers, an opportunity to test the market, and not on preserving the

competitive position of domestic manufacturers.

What the Register's statement appears to mean is that it is not, in general, profitable to produce an edition of less than 3,500 copies, and that we will therefore concede full copyright protection to the foreign enterprise on the unprofitable less-than-3,500 business. We feel this to be a wrong approach. The testing of the market is still the proper criterion. We recognize that the market is larger than it was in 1949, and that perhaps some greater opportunity to test should now be accorded. We would not oppose some modest increase in present figures, perhaps to 2,000, but the market has not increased over 100 percent and we surmise that the figure of 3,500 is either an arbitrary guess or is based on an improper standard.

The third, and by far our most important problem, relates to what I shall call reproduction proofs, though actually the problem is much broader and includes a host of new and substitute processes which have come to replace traditional methods of typesetting. In one way or another, as already suggested, these new processes make it possible to set type outside the United States but, by reproducing it on film, paper, tape or in another form, avoid the shipment of the actual

type into this country.

That this practice is a clear violation of existing law appears to us to admit of no reasonable doubt. Section 601(c) of the present act provides that the requirements of the manufacturing clause are met if books have been printed from "type set in the United States" or from "plates made in the U ited States from type set therein" or, if it is by a lithographic or photoengraing process, then "by a process performed wholly in the United States." If any other process is used then "every step in their reproductive manufacture" must have been performed in the United States. We do not see how the statute can be read otherwise. This is not the appropriate forum in which to file a brief on this problem, but it is a well-settled canon of statutory interpretation that one looks to the evil which Congress intended to eliminate to discover the meaning of language. The mere fact that the Congress did not in the statute passed in 1909 mention reproduction proofs or computers, both then quite unknown, is no adequate ground for permitting that this patent evasion of the congressional intent that works should be manufactured in the United States.

That this is a correct reading is buttressed, we feel, by the bill, introduced by the chairman of this committee in the 2d session of the 88th Congress at the request of the Register of Copyrights, H.R. 11947, which in section 43(c) proposed to clarify the language of the statute by providing that "a copy has not been wholly manufactured in the United States if any step in the process of its reproductive manufacture, including but not limited to the composition of type and the preparation of sheets, film, plates, mats, reproduction proofs, tapes, or other devices for the reproduction of copies by any process, took place outside

the United States."

The report of the Register already cited, at page 146, states that the "present law is unclear on this point" (whether reproduction proofs are included). He recommends that the Congress "maintain the status quo on the issue of foreign composition" by preserving the "ambiguous and awkward language of the 1909 statute." This obviously means that the matter is to be left to subsequent

judicial determination as to the scope of the clause, and we are sufficiently confident of our interpretation to be content to leave it there. Our difficulty in this connection has been that this question can only be decided in an infringement suit, in which the defendent sets up the manufacturing clause as a defense. We are not publishers, and we have not been and are not likely to be sued for infringement. And while we have a lively and important interest in the matter, our legal interests are so indirect that we have no standing to bring suit; the penalty for a violation—loss of copyright—cannot be addressed to us or to any member. While we share the Register's dissatisfaction with the present uncertainties (which we feel are entirely fictional), we have therefore not been able to take affirmative steps to solve it judicially. Book publishers are understandably content to wink at these violations, and some book manufacturers have profited from them. Hence the matter has dragged on, but we are confident that it will be oroperly resolved in an appropriate case in the future.

While the Register has not said so, we feel that the change of position between the 1964 draft and the present bill is to be found at page 146 of his report. He there notes that "if the book publishers' construction of the disputed language in the present copyright statute is correct, it could be argued that a more restrictive provision in the revised law would violate the treaty obligations of the United States under the * * * GATT." We disagree, and feel that if the Congress in 1965 wishes to clarify a statute adopted in 1909, it yiolates no international undertaking; the law remains what it has been all along. But be that as it may, the important word in the quoted language is "if." If our construction of the clause is correct, it can hardly be argued that a statute adopted in 1909, some 40 years before the GATT had been drafted, violates any obligation of the United States under it. Nor do we feel that it can be seriously contended that the GATT has deprived the Federal courts of the power to interpret domestic legislation, whenever macted.

We are, of course, opposed to any effort to legalize this practice, either in the form of a forthright amendment of the statute, or under the guise of interpreting existing law. We have stated our reasons—historical, economic, and moral—for believing that the manufacturing clause was and is wise legislation. To carve out this gaping exception cannot be justified; there is even less merit in the re-

peal of the entire clause.

There appears to be some feeling that the United States is alone in imposing conditions on the grant of a monopoly of its domestic market. Nothing could be further from the truth. Practically every country in the world including the United Kingdom has a so-called working requirement in the patent field, other than the United States; that is, manufacture in the country is a condition of maintaining patent rights (see Haddon: A Compendium of Patents and Designs, Law and Practice, 1931). Over the years there have been a host of other restrictions. In Mexico, for example, it is provided that the right to translate a work into Spanish is lost if not exercised within 3 years. Some countries, such as France, have simply forbidden importation of many classes of books altogether. Some impose prohibitive duties on works in their language. Others such as Brazil and Portugal have required licenses as a condition of importation which are rarely granted to works in Portuguese. Currency restrictions have been imposed. In brief, the grant of copyright has never been thought to carry with it the unconditioned right to make a profit from the copyright, and many countries. while granting copyright, have imposed a variety of conditions which make it meaningless. In short, it is totally inaccurate to view the United States as a dog in the manger, while other countries permit book importation without restrictions. We have not yet heard of any activity on the part of American citizens to remove the "working requirement" from British patent law as an unreasonable restriction, and we would regard such efforts as a highly questionable interference in a matter of domestic British law.

Whatever our differences with the various publishers' associations, we do share their concern with some of the proposed "fair use" amendments now being proposed. We think the more extreme of these proposals, which would allow substantially unlimited copying for some or all purposes and by some or many groups, amount to the substantial repeal of all copyright legislation. Manifestly, an author can look only to a publisher for the royalties which are his incentives to write. In many fields of publishing, the very lively possibility now exists that with computerized retrieval systems and unlimited copying rights, a single copy of a work could supply the national demand. What author can live on, or what

publisher can afford to publish for, the income from a single copy of a work? If adopted, these proposals would have a highly adverse effect on scholarship in many fields in which, even under present conditions, the market is so highly

specialized as to make publication hazardous or impossible.

It is our view that the constitutional provision with respect to copyright lays on the Congress an affirmative duty to see to it that the rights of authors and publishers in their works be protected. We recognize that there can be, and has been, a lively debate as to just what those rights should be. But we think there cannot and should not be any debate as to whether they should be eliminated by granting the right to unlimited copying to any group, however beneficient

its purposes.

If the Congress accepts the recommendation of the Register and adopts section 107 of the proposed bill, we think it should be made entirely clear that the adoption of this provision is not intended to broaden the limited right of fair use as heretofore interpreted by the courts. There is all the difference in the world between a library photocopying an occasional page of a work for the use of a scholar, and the making of multiple copies of entire works by any of the photographic processes which may now substitute for printing, presswork and binding. We have no desire to inconvenience scholars or librarians, but their convenience ought not to become a pretext for the repeal of the copyright law. It will be sufficiently difficult to police copyrights as photocopying and other processes become less costly, more versatile, and more widely disseminated, without a statutory diminution of the legal rights of the holders of copyrights.

In conclusion, then, it is our position that the Congress ought to encourage higher wage rates abroad by exempting from the manufacturing clause products coming from countries with working conditions comparable to those in the United States; that it ought to reject the 3,500 proposals on importation in favor of a far more modest increase; that it should adopt the Register's position on the issue of reproduction proofs and similar new and substitute processes; and that it ought to reject any proposals to broaden the concept of fair use as heretofore developed by the courts. We suggest that all of these proposals are clearly in the

national interest.

SUPPLEMENTAL STATEMENT OF GERHARD P. VAN ARKEL SEPTEMBER 18, 1975

I turn now to "at part of Section 601 which grants a specific exemption for Canada. We are in favor or this provision and urge that it be retained.

In taking this position, we are gladly carrying out a commitment which we made, along with others, in the so-called Agreement of Toronto. This Agreement was the outgrowth of a meeting in Toronto on February 16, 1968, of repre-

ment was the outgrowth of a meeting in Toronto on February 16, 1968, of representatives of the U.S. and Canadian business and labor organizations concerned with printing and publishing. The purpose of this meeting was to discuss three interrelated issues of mutual interest, namely, an exemption for Canada from the U.S. manufacturing clause, Canadian acceptance of the Florence Agreement, and effective resistance to weakening of international copyright protection. After a thorough discussion of all aspects of these interrelated issues, unanimous agreement was reached on four courses of action. A brief memorandum summarizing the points of agreement was carefully drafted and then approved by all members of the Canadian group and the U.S. group in March, 1968.

You may recall, Mr. Chairman, that Robert W. Frase, then Director of the Joint Washington Office of the American Book Publishers Council and the American Educational Publishers Institute, who signed on behalf of the U.S. group, wrote to you on April 1, 1968, about the Toronto Agreement and enclosed a copy of it. For the record, I would like to submit a copy of Mr. Frase's letter to you, together with a copy of the Toronto Agreement which was enclosed with

that letter.

In negotiating the Toronto Agreement, the U.S. group sought assistance in achieving three major objectives: (1) assistance of the Canadian Government in opposing the Stockholm Protocol or similar actions weakening international copyright; (2) Canadian adherence to the Florence Agreement; and (3) removal of any remaining barriers to trade between Canada and the United States affecting the printing and publishing industries. The main objective of the Canadian group was to secure the elimination of Canada from the effects of the manufacturing clause as part of the General Revision of the Copyright Law. Both groups were extremely pleased at the Agreement and felt that real progress could be made to achieve all of the objectives of both groups.

The sequence of actions by each of the two groups was thoroughly considered

and was incorporated in the memorandum.

The Canadian group promptly took the specific action to which it had committed itself at Toronto. It informed the Canadian Government of the Toronto Agreement and specifically urged (1) that, when exemption of Canada from the manufacturing clause became law, Canada accept the Florence Agreement, thus removing the present Canadian ad valorem duty of 10 percent on a large volume of U.S. book exports to Canada, and (2) that the Canadian Government oppose adherence to the Stockholm Protocol or similar actions weakening international copyright. Since that time, the Canadian group has continued to keep its Government informed and has continued to support these positions. It was always clearly understood by all concerned that Canada's acceptance of the Florence Agreement, which can be accomplished very simply and quickly, would follow the granting of Canadian exemption from the manufacturing clause. As far as the Stockholm Protocol is concerned, the Canadian Government cooperated closely with the United States and both countries achieved their joint objective.

On the U.S. side, the U.S. group promptly conveyed notice of the Agreement of Toronto to the Executive Branch of the Government and also the appropriate subcommittees of the Senate and House Judiciary Committees. During the entire period that the Copyright Revision Bill was pending in the Senate, following passage of the House bill in 1967, the U.S. group urged that an exemption for Canada be included in Section 601. This position was accepted, successively, by the Senate Subcommittee on Patents, Trademarks and Copyrights; the Senate Judiciary Committee; and the Senate itself. The report of the Senate Judiciary

Committee states as follows on page 198:

"The committee has adopted the proposal put forward by various segments of both the U.S. and the Canadian printing industries, recommending an exemption for copies manufactured in Canada. Since wage standards in Canada are substantially comparable to those in the United States, the arguments for equal

treatment under the manufacturing clause are persuasive."

We were pleased that H.R. 2223, as introduced, contained the Canadian exemption in the same manner as it had passed the Senate last year and in the same manner as is provided in Senator McClellan's companion bill. S. 22. We have every reason to believe that, if this provision is retained in the bill as it is finally approved, Canadian acceptance of the Florence Agreement will follow shortly thereafter. In the unexpected event that it would not, we would surely then urge

the Congress to withdraw the exemption.

In urging this exception for Canada, we do not mean to gloss over the existing irritants between Canada and the United States in the field of publishing and printing. However, we earnestly believe that the best chance of removing some or all of these irritants lies in improving the relationship between the two countries in the areas of printing and publishing. This can best be done, in our view, by carrying out the remaining obj. tives of the Toronto Agreement in the sequence there intended, i.e., by Canadian exemption from the manufacturing clause, followed promptly by Canadian acceptance of the Florence Agreement. The atmosphere would then be propitious to carry out the final objective of the Toronto Agreement—the removal of any remaining barriers to trade between the two countries affecting the printing and publishing industries.

To our knowledge, the only objection that has been made before this Subcommittee to Canadian exemption has been by the Departments of State and Commerce on the ground that such exemption would be a violation of an executive agreement known as the GATT (General Agreement on Tariffs and Trade) and

of certain unspecified bilateral treaties.

We believe that it is significant that the Senate Subcommittee, the Senate Judiciary Committee and the Senate as a body disregarded even broader and more basic objections by the Department of State registered in 1967. At that time, the State Department took the position that an exception for Canada "would create a conflict with the spirit of the most-favored-nation requirement in Article I i the GATT], and in all likelihood with the words of Article I calling for st-favored-nation treatment with respect to all rules and formalities in connection with importation and exportation' (the Protocol does not except legislation inconsistent with Article I); and would also create a new conflict with the nondiscrimination requirement in Article XIII, paragraph 1..."

The State Department also stated that the Canadian exemption "would be contrary to the requirements for most-favored-nation treatment contained in

bilateral commercial treaties with many of our trading partners [citing treaties with Germany and Japan, 'both of which contain most-favored-nation provisions

similar to Articles I and XIII of the GATT]."

We are pleased to note that, in its statement to this Subcommittee on May 8, 1975, the State Department representative abandoned any reference to violation either of the letter or the spirit of most-favored-nation principles in Article I of the GATT. In this important respect at least, the State Department accedes to the technical position which we took before the Senate Subcommittee in 1967. We do not regard the reference to "various bilateral treaties" as of any independent significance. As we pointed out in our technical memorandum in 1967, the various bilateral commercial treaties are not a separate reason for opposing a Canadian exemption, because they each contain provisions authorizing any action which is regarded or permitted by the GATT. Thus, we are still left only with the question whether an exception would be precluded by the GATT.

The only basis upon which the Department of State now claims that obligations under the GATT would be violated by a Canadian exception is Article XIII of the GATT. This section of the executory agreement requires nondiscriminatory administration of quantitative restrictions. We believe that the State Department is taking an invalid and simplistic position in attempting to apply Article XIII to an exemption for Canada from the U.S. manufacturing requirements. The history and context of paragraph 1 of Article XIII make it clear that this provision refers only to nondiscriminatory administration of quotas or other restrictions which come within one of the three exceptions authorized by the GATT-Article XI, paragraph 2; Article XII; and Article XIII, section b. It is not a blanket prohibition against all types of restrictions which do not apply equally to all countries. It applies only to the restrictions which come within any of the three above enumerated exceptions.

As we pointed out in our technical memorandum in 1967, the State Department itself, in various publications interpreting Article XIII, has related the nondiscriminatory requirement to quantitative restrictions on imports under one of the three enumerated exceptions. Since the manufacturing clause is not a restriction authorized by any of the three exceptions, Article XIII does not apply to it. Indeed, the whole context of Article XIII, which refers to allocation of quotas among supplying countries, makes it clear that the situation dealt with has no relationship at all to administration of the manufacturing clause of the copyright laws. Rather, the manufacturing clause is sui generis. It is an exten-

sion of the benefits and protection conferred by the copyright monopoly.

We are used to the idea and practice that U.S. copyright is enforceable by an author's publisher to protect the copies manufactured by the one selected producer against the independent manufacturer of copies by any other book manufacturer, including all American book manufacturers. Normally, only a single manufacturer is chosen to produce all of the copies for the national market. The Canadian exception in Section 601 merely extends to a Canadian book manufacturer the eligibility to be selected as the single manufacturer, or perhaps as one auxiliary manufacturer. Hence, to discuss the manufacturing clause or copyright law as a restriction on international free trade is anomalous and inappropriate,

At this point, Mr. Chairman, I ask permission to submit for the record copies of

the following:

1. Excerpts from the BMI testimony before the Senate Subcommittee on Patents, Trademarks and Copyrights, April 6, 1967, pages 678-677.

2. Letter dated September 19, 1967, from the Department of State to the Chairman of the Senate Subcommittee on Patents, Trademarks and Copyrights.

3. Letter dated October 11, 1967, to the Senate Subcommittee on Patents, Trademarks and Copyrights from counsel of BMI, including "Technical Memorandum on Effect of Existing U.S. International Agreements on Proposed Exception of Canada from the Manufacturing Clause of the Copyright Law.'

One further point. The State Department representative referred in his testimony on May 8, 1975, to a protest by the United Kingdom against the exception for Canada. We understand that, when the United Kingdom made this protest, it was unaware of the long-standing, and recently reaffirmed, position of the British Publishers Association expressing its lack of objection to an exemption for Canada from the U.S. manufacturing clause. With your permission. Mr. Chairman, I offer for the record copies of letters dated January 3, 1968, and May 6, 1975, to Robert W. Frase from Mr. Ron Barker, Secretary of the British Publishers Association.

American Book Publishers Council, Inc.— American Textbook Publishers Institute

April 1, 1968.

Hon. ROBERT W. KASTENMEIER,

Acting Chairman for Copyright Law Revision, Subcommittee No. 3, Committee on the Judiciary, House of Representatives, Washington, D.C.

Dear Mr. Chairman: The U.S. business and labor organizations concerned with printing and publishing met with a similar representative group of Canadian organizations in Toronto on February 16, 1968, to discuss three interrelated issues of mutual interest, namely, an exemption for Canada from the U.S. manufacturing clause, Canadian adherence to the Florence Agreement, and effective resistance to weakening of international copyright protection.

As you will see from the attached copy of a memorandum signed on behalf of the U.S. and Canadian groups, we arrived unanimously at an agreement to recommend certain legislative and executive actions to our respective governments.

The Canadian group has already taken the specific action which it undertook at Toronto. I enclose a copy of a letter dated March 19, 1968, from W. E. Curry, Chairman, Joint Committee of the Printing and Publishing Industries of Canada, to The Honorable Paul J. J. Martin, Secretary of State for External Affairs. In this letter, copies of which were also sent to other appropriate high-ranking Canadian Government officials, Mr. Curry urged (1) that Canada adhere to the Florence Agreement when exemption for Canada from the U.S. manufactu.ing clause becomes law, which would result in removing the present Canadian ad valorem duty of 10% on a large volume of U.S. book exports to Canada, and (2) that the Canadian Government oppose adherence to the Stockholm Protocol or similar actions weakening international copyright.

All of us from the United States who attended the Toronto meeting, and all of the various organizations and interests we represent, feel strongly that it would be greatly to the advantage of the United States to achieve at the earliest possible date the objectives agreed upon at Toronto. I am therefore writing to you, on behalf of the U.S. group, to urge that Canada be exempted from the U.S. manufacturing clause. The sooner this can be accomplished in any appropriate bill dealing with copyrights, the sooner we will be able to obtain for the United States the completion of Canadian action called for by the Toronto Agreement.

I am also authorized to state that the Authors' League of America shares the

views expressed in this letter.

An identical letter has been sent to The Honorable John L. McClellan, Chairman of the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary.

Sincerely yours.

ROBERT W. FRASE.

AGREEMENT OF TORONTO

Representatives of the U.S. and Canadian business and labour organizations concerned with printing and publishing met in Toronto on February 16, 1968 to discuss three interrelated issues of mutual interest, namely, an exemption for Canada from the U.S. manufacturing clause, Canadian acceptance of the Florence Agreement, and effective resistance to weakening of international copyright protection.

After a thorough discussion of all aspects of these interrelated issues, the

following courses of action were unanimously agreed upon:

(1) The Canadian group will promptly inform the Canadian Government of the Toronto meeting and of the agreement to take parallel action on both sides of the border to bring about exemption for Canada from the U.S. manufacturing clause and the acceptance by Canada of the Florence Agreement. The Canadian group will urge the Canadian Government to accept the Florence Agreement as soon as exemption for Canada has been adopted by the U.S. Congress. It is noted that the acceptance of the Florence Agreement can be accomplished in Canada without the necessity of an Act of Parliament.

plished in Canada without the necessity of an Act of Parliament.

(2) The U.S. and the Canadian groups will co-operate closely in urging their respective governments to consult and work together to oppose the Stockholm Protocol or similar actions weakening international copyright protection which

may be proposed under the Universal Copyright Convention.

(3) The U.S. group will do its utmost to obtain incorporation of an exemption for Canada in the manufacturing section of the bill to revise the U.S. copyright law (S. 597) now being considered by a U.S. Senate Subcommittee. Specifically, the U.S. group will inform the Department of State of the Toronto meeting and will urge the Department (a) not to oppose an exemption for Canada from the U.S. manufacturing clause, and (b) to work closely with the Government of Canada in opposing weakening of international copyright protection under the Berne Convention or the Universal Copyright Convention. The U.S. group will also bring to the attention of the appropriate subcommittee of the Senate and House Judiciary Committees the recommendations of the Toronto meeting with respect to the manufacturing clause amendment.

(4) It is anticipated that co-operative efforts on, and resolution of, the foregoing issues in a mutually satisfactory manner will lead promptly to definite future co-operation between the United States and Canadian groups on the removal of any remaining parriers to trade between the two countries affecting

the printing and publishing industries.

On behalf of the U.S. group:

ROBERT W. FRASE,
Director, Joint Washington Office,
American Book Publishers Council,
American Educational Publishers Institute,
(And seven others).

On behalf of the Canadian group:

W. E. CURRY,

Chairman, Joint Committee of the

Printing and Publishing Industries of Canada,

(And seven others).

COPYRIGHT LAW REVISION

HEARINGS BEFORE THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, NINETIETH CONGRESS, FIRST SESSION

Pursuant to S. Res. 37 on S. 597

Part 3-April 6, 11, and 12, 1967

[Excerpts from Statement of James H. French, Counsel, Book Manufacturers' Institute, Inc., pages 676-677]

The cultural and educational interrelationship of the U.S. and Canada indeed reflects a unique situation which requires a special solution. And there is no need to retain the prote ion of the manufacturing clause as to Canada.

In recommending that Canada be exempted from the provisions of the manufacturing clause, we quite naturally have examined this subject from the point of view of our own self-interest. We have concluded that book manufacturers in the United States will not suffer injurious consequences if this is done. Production techniques, quality, and distances to major market areas are all so similar that we foresee no disruption in the American book manufacturing industry as a result of Canadian exemption. Canadian wage rates and costs of equipment and production are comparable to our own and will provide the kind of competition that we can contend with.

On balance, we feel that the exemption of Canada from the manufacturing clause will simply remove an irritant between Canada and the United States, will promote a healthy degree of cooperation between publishers and book manufacturers in both countries, and will help to promote an atmosphere in which friction occasioned by actions and recriminations by citizens of both countries

can be significantly reduced.

We wish to make it clear that we are not reintroducing the wage parity formula that the House Committee last year found raised "complex problems of foreign policy and administration." We are recommending enactment of a direct, forthright exemption from the manufacturing clause for Canada. We do not believe that such an exemption will be found objectionable from any reasonable international trade viewpoint, or that it will in any way contravene the General Agreement on Tariffs and Trade (GATT).

Under the Protocol of Provisional Application of the GATT, the United States agreed to apply Part II of the GATT to U.S. laws in existence on January 1, 1948, only to the extent that it is not inconsistent with such laws. The manufacturing clause of the United States Copyright Law has been in existence since 1891 and represents an integral part of United States Copyright policy. Thus, to the extent that anything in Part II of the GATT is inconsistent with the dynamic implementation of United States Copyright policy through the manufacturing clause, it must give way. This is the very raison d'etre of the Protocol of Provisional Application.

Our conclusion that nothing in the GATT prevents the granting to Canada of an exemption from requirements of the United States Copyright Law derives additional support from the existence, in Article XX of the GATT, of a general exception for national measures relating to copyright. This exception clearly demonstrates the intentions of the member nations not to interfere with expres-

sions of national policy manifested through Copyright Laws.

The exception in Article XX is made subject to "the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." No country other than Canada has the same conditions prevailing in its printing industry as does the United States. Therefore, exemption of Canada from the manufacturing clause of our Copyright Law would not constitute "a means of arbitrary or unjustifiable discrimination" under Article XX. Far from being "a disguised restriction on international trade," such exemption would tend to expand international trade between the United States and Canada without decreasing it between the United States and other countries.

But most persuasive of all is the GATT's clear recognition, in Article XXIV, of (a) the need for special and preferential measures between adjacent countries in order to facilitate frontier traffic and (b) the desirability of increasing freedom of trade between such countries through closer integration of their

economies.

Under these circumstances, it is difficult indeed to see how any country could justify the lodging of a complaint under the GATT if the United States exempts Canada from long-standing requirements of the U.S. Copyright Law. If the fear should prevail that such a complaint may be effectively put forth, then we believe that the Administration should move promptly to obtain a waiver under Article XXV of the GATT. Such a waiver should be quite easy to obtain.

Only a strained interpretation of this country's GATT obligations could support an argument against the exemption here requested. And in view of the clear unanimity on both sides of the border that such a result is desirable, it is difficult to see how an argument for such a strained interpretation can be defended.

Nevertheless, we recognize that it is possible to argue that the Most Favored-Nation requirements of Article I of the GATT and the non-discrimination requirements of Article XIII militate against the making of any special arrangements with any single country, even one having such a special interrelationship with the United States as does Canada. In our view, however, neither of these

Articles applies.

Article XIII, as its title states, requires the "Non-discriminatory Administration of Quantitative Restrictions." The entire context of this provision makes it quite clear that the provision's requirements are designed to apply to certain quantitative restrictions specifically authorized by another of the Agreement's provisions, Article XI, paragraph 2. The manufacturing clause of the Copyright Law is not a restriction authorized by Article XI, and, therefore, Article XIII does not apply to it. In any case, since Articles XI and XIII are in Part II of the GATT and are covered by the Protocol of Provisional Application, neither applies to the extent that it is inconsistent with the action proposed.

Turning to Article I, the Most-Favored Nation clause of the GATT, we do not believe that this provision, properly interpreted, prevents the proposed exemption for Canadian printing. Article I provides in effect that with respect to four enumerated categories of matters, any advantage granted to the products of one country must simultaneously be extended to the like products of all countries.

The first three enumerated categories, relating to (1) customs duties and charges, (2) the method of levying such duties and charges, and (3) rules and formalities in connection with importation and exportation, clearly are not applicable. (Now that the United States has implemented the Florence Agreement, there are not to our knowledge any duties or other charges on printed matter

entering this country from abroad, certainly not on any commodities affected by the manufacturing clause.) These three categories are the only ones set forth

in, and encompassed exclusively within, Article I itself.

The fourth category is actually set forth in two paragraphs of Article III relating to "National Treatment on Internal Taxation and Regulation," and is only incorporated in Article I by reference. This category breaks down into two subcategories: (a) internal taxes or other internal charges (Article III, para. 2); and (b) laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution, or use (Article III, para. 4). Paragraph 2 of Article III clearly does not apply.

On its face, paragraph 4 of Article III might appear to apply to the present proposal but for two significant facts. In the first place, the fact that national copyright laws are signed out and made the subject of a general exception in Article XX makes it clear that the Copyright Law is not the type of "law, regula-

tion, or requirement" referred to in Article III, paragraph 4.

But, more importantly, the Protocol of Provisional Application again comes into play to prevent anything in Article III from interfering with the evolution and revision of the long-standing United States Copyright Law. Although the Protocol does not purport to apply to Article I of the GATT, it does apply to all matters referred to in Article III. Thus, when Article I incorporates paragraphs 2 and 4 of Article III by reference, making the matters enumerated therein subject to the Most-Favored-Nation principle, it does so only subject to the Protocol of Provisional Application.

Therefore, we see nothing in Article I or in any other provision of the GATT

that would bar the type of action that we are proposing.

Accordingly, we ask that a provision be added to S. 597, exempting books and other printed material manufactured in Canada from the scope of Section 601. If, for any reason, direct exemption for Canada in the present bill is impossible, we respectfully urge that, at the very least, the U.S. Department of State be requested to seek the most immediate means by which Canada may be exempted from the manufacturing clause without sacrificing the general maintenance of that clause.

OPPOSITION TO DEMANDS FOR FREE USE OF COPYRIGHTED PRINTED MATERIAL

Now, having just endorsed a special exception favoring Canadian printers, I am going to turn about and urge denial of the demands which have been, or may be, made by various groups of users of copyrighted printed matter for a blanket authorization to make free use of such matter. I have no difficulty mak ing such a transition since I believe that the exemption sought for Canadian printers is just and warranted, whereas the requests for permission to make free use of copyrighted material are not.

> DEPARTMENT OF STATE. Washington, September 19, 1967.

Hon. John L. McClellan, Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. Senate.

DEAR MR. CHAIRMAN: Thank you for your letter of April 10 affording the Department an opportunity to express its views on a proposed amendment to section 601 of S. 597 which would except Canada from the provisions of the book manufacturing clause. The clause, as carried over from present law, would restrict imports into this country of books and other works by American authors not manufactured, i.e. printed and bound, in the United States by deny-

ing full copyright protection to such works.

The Department is aware of the great imbalance in the flow of books between Canada and the United States, and it is our view that the manufacturing clause's limitation on the importation of printed words should ultimately be eliminated. This Department testified before Subcommittee No. 3 of the House Judiciary Committee on August 26, 1965 that it believes the perpetuation of the manufacturing clause is contrary to our liberal trade policy and our interest in improving the free flow of educational, scientific, and cultural materials internationally. However, the Department also stated that it would be necessary first to ascertain more definitely what the effect would be of completely

eliminating this long-standing protection. In the meantime, granting of the proposed exception to Canada alone would result in a discrimination against books printed in other foreign countries in violation of the General Agreement on Tariffs and Trade (GATT) as well as many of our bilateral commercial

In this regard we have studied with care the issues raised in Mr. French's submission accompanying the proposal to except Canada. As Mr. French notes, our present restriction on the importation of books avoids conflict with Article XI of the GATT only by virtue of the Protocol of Provisional Application, which provides that the laws existing on October 30, 1947 are not in violation of Part II of the GATT. While the proposed exception would be a liberalization in the sense that it would allow increased imports of books from Canada, it is clearly discriminatory in granting a concession to the Canadians not offered to our other trading partners. The Protocol has been interpreted to allow re-enactment of laws existing in October of 1947, and to allow the liberalization of such laws. However, the proposed modification of the law creating a discriminatory exception would create a conflict with the spirit of the most-favored-nation requirement in Article I, and in all likelihood with the words of Article I calling for most-favored-nation treatment "with respect to all rules and formalities in connection with importation and exportation" (the Protocol does not except legislation inconsistent with Article I); and would also create a new conflict with the non-discrimination requirement in Article XIII, paragraph 1, providing that:

"No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party. unless the importation of the like product of all third countries is similarly

prohibited or restricted."

Mr. French suggests Article XIII applies only to prohibitions or restrictions authorized under Article XI. However Article XIV, paragraph 1, specifically excepts from Article XIII, under certain circumstances, restrictions authorized by Articles XII and XVIII, section B, thus indicating that Article XIII was meant to apply to prohibitions and restrictions generally. Consequently, this Department believes it applies also to ban new provisions that would introduce discriminatory prohibitions on imports even when these new provisions are modifications of restrictions which are themselves exempted from the GATT Article XI requirements by virtue of the aforementioned Protocol.

Moreover, a discriminatory provision such as is proposed would be contrary to the requirements for most-favored-nation treatment contained in bilateral commercial treaties with many of our major trading partners (see e.g., our Friendship, Commerce and Navigation Treaties with Germany, (TIAS 3593), paragraphs 1 and 3 of Article XIV, and Japan (TIAS 2863), paragraphs 1, 2, and 3 of Article XIV, both of which contain most-favored-nation provisions

similar to Articles I and XIII of the GATT).

Mr. French further contends that the book manufacturing clause is excepted from GATT requirements by Article XX, paragraph (d). This provision permits measures to secure compliance with laws and regulations for the protection of copyrights providing such laws and regulations "are not inconsistent with the provisions of this Agreement." The over-all heading of Article XX also requires that such measures do not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." While Article XX(d) may permit new measures, for example, prohibiting importation of books or work that would infringe a copyright, it would not permit a new provision in a copyright law laying on a fresh discrimination among countries as to the importation of books into the United States.

A further suggestion is that Article XXIV of the GATT, which provides for exceptions for customs unions, free trade areas, and frontier traffic, applies to a provision such as the proposed exception to the manufacturing clause. However, it does not appear that such an exception would fit into any of the above categories. Customs unions and free trade areas involve comprehensive tariff and trade arrangements providing for the removal of dutie and other trade restrictions from most if not all of commodities in trade between two or more countries. An agreement covering only books could not properly be considered as establishing a free trade area. The exception for frontier traffic is also inapplicable since it was intended to apply to local traffic between neighboring areas close to the frontier.

Although it is in theory possible for the United States to seek a waiver of its obligations under the GATI and the bilateral treaties, the Department does not view this as a feasible course of action. In addition to legal problems which would have to be surmounted, such an approach would conflict with major policy goals of this Government, i.e. to maximize international trade through the most-favored-nation principle and to maintain the strength of the GATL organization.

In summary, the Department feels that as long as the manufacturing clause remains a part of the copyright law, it would not be proper to except any nation from its provisions. We therefore would advise against the amendment proposed

by Mr. French.

We shall be glad to be of service should you desire further information or views

from the Department.

The Bureau of the Budget has informed the Department that from the standpoint of the Administration's program there is no objection to the submission of this report.

Sincerely yours,

WILLIAM B. MACOMBER, Jr.,
Assistant Secretary for Congressional Relations.

Sellers, Conner, & Cuneo, Washington, D.C., October 11, 1967.

Hon. John L. McClellan, Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On September 19, 1967, some five months after its views were requested, the Department of State wrote you a letter opposing the enactment of an exception for Canada from the provisions of Section 601 of S. 597, the Manufacturing Clause of the Copyright bill. Exclusion of Canada from the provisions of the Manufacturing Clause had been recommended in the hearings by all representatives of the United States book manufacturing industry and the international trade unions representing the graphic arts workers in the United States and Cánada.

With all due respect to the expertise of the Department of State in the interpretation of international agreements, we believe that in this case the Department has made an incorrect interpretation of the provisions of the General Agreement on Tariffs and Trade (GATT) and of bilateral commercial treaties to which the United States is a party. We have prepared, and enclose herewith, a memorandum which, we believe, effectively disposes of the technical objections raised by the Department.

In this letter, we wish to concentrate upon certain deficiencies in the Department's basic approach and perspective concerning this legislation. These deficiencies cast considerable doubt upon the soundness of the Department's opposition, which is perforce dictated by the "spirit," and not the letter, of this country's most-favored-nation obligations under its international commercial treaties.

The basic flaw that permeates the entire negative attitude of the Department is that this controversy is cast in the light of a free trade question. The Department's letter gives the impression that the manufacturing clause would apply to all works imported into the United States and that the partial denial of copyright protection is merely the means of enforcing a trade restriction. Putting the issue in this light is very misleading and sows confusion where clarification is needed if the Congress is to legislate effectively in this complex area.

The manufacturing clause is a copyright provision and should not be dealt with as a simple trade restriction. Copyright does more than simply recognize the right of an author to the creations of his mind. It creates an economic property exploitable only by the holder thereof. Through assignment, the holders of these economic monopolies normally are large publishing houses, not the authors themselves. These publishing houses employ the book manufacturer and graphic artisans to manufacture the multiple copies of a manufacturer is designated, he, too, becomes the reciping of the benefits and protection conferred by the copyright monopoly.

If a publishing house designates a foreign book manufacturing concern in order to obtain the copies at a lower cost, or for whatever reason, that foreign book manufacturer becomes the beneficiary and the equitable owner of the copyright monopoly at the book manufacturing level of the process. The copyright is enforceable by the publisher to protect the copies manufactured by the selected

producer against the independent manufacture of copies by any other book manufacturer including all American book manufacturers. Normally, only a single manufacturer is chosen to manufacture all of the copies for the national market,

Accordingly, to discuss the manufacturing clause of our copyright law as a restriction upon international free trade is anomalous. Trade in books that are subject to a copyright monopoly cannot be free trade in any real sense, either domestic or international. All stages of the production and sale of such books are covered by the copyright umbrella. The manufacturing clause is, in reality, a limitation on copyright that simply requires that the benefits of this monopoly not be utilized in such a way as to give foreign concerns and foreign workers a monopoly to the exclusion of American book manufacturing firms and graphic artisans. This limitation derives major economic significance from the fact that most foreign concerns, enjoying production costs far below the costs experienced by their American counterparts, have a very distinct competitive advantage. However, it is not the competitive advantage in and of itself which gives rise to

the need for the manufacturing clause, it is the copyright monopoly.

The Congress long ago decided that a limitation, i.e. the manufacturing clause, prohibiting under cortain circumstances the extension of the conveight monopoly.

The Congress long ago decided that a limitation, i.e. the manufacturing clause, prohibiting, under certain circumstances, the extension of the copyright monopoly to foreign book manufacturers is a reasonable limitation upon copyright. This limitation has been steadily narrowed through the amendment process, and the bill that is before the Senate today would apply the manufacturing requirement only to copies above 2,000 of copyright works that are non-dramatic literary works in the English language. The new clause would not apply to works written by foreign or expatriate American authors; nor would it apply to musical works, dramatic works, works in a language or languages other than English, or works that were not copyrighted or are no longer protected by copyright. Neither would it apply to works printed in small (i.e., under 2,000 copies) quantities. In short, all types of works with respect to which American printers cannot legitimately claim the right, and need, to be brought under the copyright umbrella, are excluded from the clause. It is submitted that this limitation is eminently reasonable and is essential to prevent great harm to American book manufacturing by producers in a large number of low wage foreign countries.

It is precisely because no such injury would result from extension of the copyright monopoly to Canadian book manufacturers that all segments of the American industry have been willing to support the exclusion of Canada from the provisions of the manufacturing clause. The wages of Canadian graphic artisans and the overall costs experienced by the Canadian book manufacturers are on a par with those of American book manufacturing concerns. It must be recognized that there is an enormous imbalance in the trade in printed matter between the United States and Canada and that the United States and Canada in reality constitute a single market for literary materials. Accordingly, the objective seems to us to be crystal clear and unquestionably desirable. The only remaining question is whether the United States can accomplish this purpose without violating its other international obligations. In our view, the Department's letter itself impliedly admits that this goal can be accomplished.

The State Department's opposition, as indicated in its September 19 letter, is based upon an adherence to the most-favored-nation ideal that is so rigid and slavish that it poses a challenge to the leadership of the Sepate in the field of foreign policy. The Department asserts that the exclusion of Canada from the manufacturing clause would violate the "spirit" of the most-favored-nation requirement found in Article I of the GATT. We read this assertion as a clear admission by the Department that exclusion of Canada from the requirements of the manufacturing clause would not constitute a violation of the actual requirements of the most-favored-nation article. One is moved to inquire why the Department would oppose a move that has the backing of all affected interests on both sides of the border and that does not violate the letter of this country's GATT obligations.

It is perhaps understandable that the Department of State has focused its attention on one narrow segment of one issue involved in this problem, i.e., its possible bearing on our international trade policies. The Committee's consideration must obviously be far broader as we have attempted to point out. Vital interests of American book manufacturers, graphic arts workers, our own commerce and trade, economic relations between the United States and Canada and common fairness to all involved interests must be weighed in the balance. In our view, the strength of these factors far outweighs the limited and dubious technical views expressed by the Department in its letter.

In conclusion, all parties on both sides of the Canada-United States border are in favor of excluding Canada from the provisions of the manufacturing clause. To do so would be of substantial benefit to Canada and would in no way impose any new or additional restrictions on U.S. trade with any other country. Moreover, since the clause is a unique copyright provision, the United States' existing international obligations respecting free trade are inapplicable. It has specifically been demonstrated, and not refuted by the Department of State, that the proposed action would not constitute a violation of Article I, the most-favored-nation provision of GATT. Accordingly, it is quite plain that there is no real impediment to excluding Canada from the manufacturing clause, and we urge that this be done.

In the preparation of these views, I have consulted with all immediately

affected American interests and they concur in all views expressed.

Very truly yours,

JAMES H. FRENCH.

TECHNICAL MEMORANDUM ON EFFECT OF EXISTING U.S. INTERNATIONAL AGREEMENTS ON PROPOSED EXCEPTION OF CANADA FROM THE MANUFACTURING CLAUSE OF THE COPYRIGHT LAW

(In response to a letter from the Department of State to the Senate Subcommittee on Patents, Trademarks, and Copyrights, dated September 19, 1967)

1. Paragraphs 2 and 5 of the State Department's letter state that an exception for Canada would violate many of our bilateral commercial treaties, e.g., our Friendship, Commerce and Navigation Treaties with Germany and Japan. The State Department citations to various paragraphs in the two treaties omit reference to Article XXIV, paragraph 4, in the German Treaty and Article XXI, paragraph 4, in the Japanese treaty which provide as follows: "The provisions of the present Treaty relating to the treatment of goods shall not preclude action by either Party which is required or permitted by the General Agreement on Tariffs and Trade during such time as such Party is a contracting party to the General Agreement. Similarly, the most-favored-nations provisions of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid Agreement." Thus, the commercial treaties are not a separate reason for opposing a Canadian exception. Rather, the question turns on whether or not sucn an exception would be precluded by the GATT.

2. We are pleased to note that paragraph 3 of the Department's letter concedes that, as claimed by Mr. French in his testimony, Article XI of the GATT would not apply because of the Protocol of Provisional Application.

3. It is stated in paragraph 3 that a special exception for Canada "would create a conflict with the spirit of the most-favored-nation requirement in Article I." This vague language seems to be a confession that after more than five months the Department of State cannot find any specific provision in the GATT which clearly bars an exception for Canada. The GATT is a highly technical document. We do not advocate action by the Congress contrary to the specific provisions of the GATT. But we do not believe that the will of Congress-if it be such-to take account of the special relationship between Canada and the United States in the exchange of printed matter by making a special exception for Canada should be frustrated by vague reference to the "spirit of the mostfavored-nations requirement."

Richard C. Snyder's book "The Most-Favored-Nations Clause" (Columbia University, 1948) is authority for a strict interpretation of complex most-favored-

nations clauses such as Article I of the GATT. Snyder says at page 58:

"By 'complex' is meant, therefore, clauses which define most-favored-nations treatment in clear detail. This does not necessarily mean, however, that complex clauses are wider in scope than simple clauses; ordinarily the reverse is true."

(Incidentally, at page 71 Snyder gives as an example of his detailed, complex most-favored-nations clause Article XI of the old U.S.-Finland treaty which refers, as does the GATT, to "all rules and formali. s in connection with impor-

tation or exportation.")

4. Paragraph 3 also states that an exception for Canada would "In all likelihood" conflict with the words of Article I calling for most-favored-nation treatment "With respect to all rules and formalities in connection with importation and exportation". It is hard to take this argument seriously. The State Department apparently was unable to fit an exception for Canada into any of the four

categories listed in Article I, especially since no customs duties or charges of any kind are involved. There is no definition of "rules and formalities" in the GATT, but the entire context seems to be that they refer to uniform requirements for customs administration in connection with importation and exportation.

On March 24, 1948, the State Department issued "A Guide to the Study of the Havana Charter for an International Trade Organization" (Commercial Policy Series 114). Article 18 of the Havana Charter is the same as Article I of the GATT. In referring to Article 16 of the Havana Charter, the State Department explained at page 3:

"In this Article each member agrees to apply, in its import and export trade with every other member, the same customs duties and the same laws and regula-

tions concerning customhouse procedures generally."

An exception for Canada as part of a general revision of the Copyright Law (S. 597) cannot be considered a rule or formality in connection with importation

or exportation.

5. The State Department also claims that an exemption for Canada would create a new conflict with the non-discrimination requirement in Article XIII, paragraph 1. However, this paragraph refers only to non-discriminatory administration of quotas or other restrictions which come within one of the three exceptions—Article XI, paragraph 2, Article XII, and Article XVIII, Section B. It is not a blanket prohibition against any restrictions which are not equally applicable to all countries. Strong support for our position comes from a number of sources:

A. The State Department prepared a document entitled "General Agreement on Tariffs and Trade, Present Rules and Proposed Revisions." This is contained in the hearings of the House Ways and Means Committee on H.R. 5550, March 1956. The following summary of the purpose of Article XIII is contained at page 1395:

"This Article requires a contracting party imposing quantitative restrictions on imports under one of the exceptions to apply them in a non-discriminatory manner."

B. The State Department, in the Guide to the Study of the Havana Charter,

referred to above, stated at page 5:

"Article 22 [the same as GATT Article XIII], as indicated by its title, likew.se deals with the same general subject as does Article 16 [GATT Article I]. Under certain circumstances, a member may be permitted to use quantitative restrictions. However, this Article insures that such restrictions as are permitted will be applied equitably to give fair treatment to exporters situated in all other member countries. It prescribes a general rule to this effect and sets forth a number of requirements to give the rule precision and enable it to be enforced."

number of requirements to give the rule precision and enable it to be enforced."

C. In the State Department publication "Preliminary Proposals for an International Trade Organization" (Commercial Policy Series 99), the following is stated at page 9 with respect t dministration of quantitative restrictions:

"One of the provisions agre _ to b. the [preparatory] Committee is a general rule for non-discriminatory administration of such restrictions as are permitted under the exceptions described above."

D. William Adams Brown, Jr., at page 257 of "The United States and the Restoration of World Trade" similarly refers, under the heading "Quantitative Restrictions," to "The non-discriminatory application of permitted restrictions."

It follows that since the manufacturing clause is not a restriction authorized by any of the three exceptions, Article XIII does not apply to it. This is actually the position taken by Mr. French in his testimony to the Senate Subcommittee, with the exception that he did not specifically mention the possibility of the other two exceptions. The result is the same.

In addition, it should be noted that the manufacturing clause is not listed among the all-inclusive "Quantitative Restrictions and Tariff Quotas on U.S. Imports in Force on November 10, 1965" published by the U.S. Tariff Commission. Also the whole context of Article XIII, which refers to allocation of quotas among supplying countries, makes it clear that the situation dealt with has no relationship at all to administration of the manufacturing clause of the copyright laws.

6. It is stated in paragraph 8 of the State Department's letter that it would not be "feasible" to secure a waiver, although it is "in theory" possible for the U.S. to seek one. We cannot see why this should be so. If there really is a strong concern that the GATT may be applicable, the logical alternatives would appear to

be either consult with the Secretariat and/or other countries, or seek a waiver such as for the Canadian auto parts agreement. In the latter case, a waiver was granted even where it was entirely clear that the provisions of GATT applied, since there were substantial duties on auto parts and discriminatory production quotas.

As of February, 1966, 14 waivers had been granted under paragraph 5 of Arti-

cle XXV of the GATT, including two to the United States.

The sole substantive reason given by the Department for its position in the present case is that to seek a waiver would conflict with the U.S. goal of maximizing international trade through application of the most favored-nation principle. It is submitted that this reasoning is based upon a misconception of the role of the manufacturing clause as a limitation upon extension of the copyright monopoly to foreign printers. The Department has incorrectly viewed the Manufacturing Clause as a restriction on free trade, not as what it really is, a limitation on copyright.

THE PUBLISHERS ASSOCIATION, London, January 3, 1968.

Manufacturing Clause Mr. R. W. Frase, American Book Publishers Council, Inc., Washington, D.C.

DEAR BOB: It seems very unlikely that I shall be able to come to Canada this month, but I have consulted the Officers of my Association and also Sir Stanley Unwin, and we are all agreed that we should not wish to raise any objection to the exemption of Canada from the U.S. Manufacturing provisions. I hope this is official enough for you.

Yours ever,

Ron.

R. E. BARKER, Secretary.

THE PUBLISHERS ASSOCIATION, London, May 6, 1975.

Manufacturing Provisions Mr. Robert W. Frase, Washington, D.C.

DEAR BOB: This is to confirm that my Association has and would not have any objection to book importations from Canada being exempted from the manufacturing provisions currently contained in Section 16 of the present U.S. Copyright Law, due to be confirmed by Section 601 of the Copyright Revision Bill now before Congress.

While I have not been able to find my copy of the letter I know I wrote to you about this sometime early in 1968, when you were with the American Book Publishers Council, our view now, as it was then, is that the manufacturing provisions of U.S. copyright legislation are out of date, providing a form of protection which has long ceased to be necessary (if it ever was), and that, in consequence, anyone who can be exempted from these provisions should be. Because of the intimate relation between printers in the USA and in Canada, there seems to us every reason for making an exception in respect of Canada, until such time as the manufacturing provisions can be done away with altogether. In the meantime, some of our own members might benefit from this exception because, of course, many of them are, like many U.S. publishers, Canadian publishers in their own right.

To give you the assurance I think you want: we should certainly not object to any exemption made in Canada's favour in this respect.

Yours ever,

(Dictated but not signed by) Mr. RONALD E. BARKER.

TESTIMONY OF GERARD VAN ARKEL, GENERAL COUNSEL, INTERNATIONAL TYPOGRAPHICAL UNION

Mr. Van Arkel. Thank you, Mr. Chairman. I want to say it was with considerable surprise that I learned that it was over 10 years ago

that I last appeared before this committee on this same topic; namely, the retention of the manufacturing clause. Mr. Strackbein has stated the positions of all of the printing trade unions on this issue. I read my testimony and statement before the committee 10 years ago: I found no reason to make any significant changes or additions. Therefore, I have taken the liberty of resubmitting my testimony as my statement before the committee here.

There was one matter that was not before the subcommittee when I last appeared, and that is the exemption for Canada from the manufacturing clause. We favor this exemption, but since it was not previously before the committee, I have taken the liberty to submit a supplemental statement covering the reasons why we think this

exemption from the clause is a desirable change in the law.

Thank you, Mr. Chairman.

Mr. Kastenmeier. Thank you very much. Our next witness is Jack A. Sandler, representing Book Manufacturers Institute.

TESTIMONY OF JACK A. SANDLER, REPRESENTING THE BOOK MANUFACTURERS INSTITUTE, ACCOMPANIED BY STEPHEN F. OWEN. JR., COUNSEL FOR THE BOOK MANUFACTURERS INSTI-TUTE, AND DOUGLAS E. HORNER, VICE PRESIDENT OF THE INSTITUTE

Mr. Owen. Let me introduce myself. I am Stephen Owen, counsel for the Book Manufacturers Institute, and this is Douglas E. Horner, the new executive vice president of the institute, and our witness is Jack Sandler.

Mr. Sandler. It looks like I am the new member to testify here,

since this is my first appearance.

My name is Jack Sandler, and I am group vice president of sales, for the book division of W. A. Krueger Co., New Berlin, Wis. Today I am appearing on behalf of the Book Manufacturers Institute [BM1] located in Ridgefield, Conn. I am presently serving as chairman of the government relations committee of BMI.

The BMI is a trade association representing approximately 80 percent of all companies in the United States engaged in the manufacture of books, which includes the prepress preparation, printing, and

binding of books.

I would like to thank the committee for allowing me to testify here

today on behalf of the members of BMI.

At the outset, I wish to emphasize the general support of the BMI for H.R. 2223 and the need for a revision and modernization of the copyright law in the United States.

With this in mind, let us consider an important provision of the bill which the BMI strongly supports and which has a great importance to the economic future of the book manufacturing industry in this country.

Section 601, the manufacturing clause:

Since 1891, as a result of legislative compromise, there has been a "manufacturing clause" in some form under our copyright law. The present manufacturing clause is contained in section 16 of title 17 of the United States Code and is supplemented by section 107.

Basically, section 16 originally required as a condition to copyright that books in the English language be manufactured from type set, plates made, and by a process wholly performed within the United States.

As you can see from our written statement, there has been a constant erosion in the manufacturing area over the years, until we arrive at the language in section 601 of H.R. 2223. This language represents a compromise developed by the book manufacturers and the trade unions, and a number of House and Senate committees in this and previous

Congresses.

Section 601 does substantially liberalize the existing manufacturing clause as it is contained in section 16 of title 17 of the United States Code. And exemption has been added for American nationals domiciled abroad for more than 1 year, and the absolute loss of copyright protection upon noncompliance with the manufacturing clause has been deleted. Further, the number of books that may be imported as exempt has been increased to 2,000, and other exemptions have been added.

Section 601 does away with the special ad interim time limits and registration requirements of the present law, and even if copies are imported or distributed in violation of the section, there would be no effect on a copyright owner's right to make and distribute phonorecords of the work or to make derivative works, including dramatization and motion pictures, or to perform or display the work publicly.

The essential question is whether Congress may impose reasonable limitations and conditions on the grant of a monopoly; namely, a copyright, in order to provide domestic printers a limited measure of protection admittedly lost when a copyrighted book is manufactured by a foreign competitor. Recognizing that the manufacturing clause is not solely a free trade issue, it should be emphasized that the needed protection for a domestic book manufacturing industry is not provided now, since the tariffs on most books were eliminated in 1966 through the implementation of the Florence Agreement by the United States. Foreign countries, on the other hand, impose many kinds of tariff and nontariff barriers and currency controls and other restrictive devices to limit the export of our books.

One of the main justifications for that manufacturing clause is economics. The cost of those skilled and unskilled labor abroad in many parts of the world is substantially less than fully comparable cost in the United States. Further, it is important to note that in the United States, labor costs constitute a higher percentage of total manufactur-

ing costs than in most other industries.

As an example, a comparison of data reported by the Department of Commerce and the 1972 Census of Manufacturing indicates a production payroll cost in the book manufacturing industry equals 44.5 percent of total value added by the manufacturer. This is compared to only 29.7 percent for all U.S. manufacturing generally.

In other words, production worker wage costs are related to the value added by the manufacturer, and are more than 50 percent higher

in book printing than the average for all U.S. manufacturing.

Further, our industry must meet U.S. standards of servicing quality and bear a certain heavy social cost in the form of OSHA compliance, EPA standards, and a host of other regulatory requirements. Our com-

petitors abroad do not have these expenses and burdensome require-

ments, and thus gain a certain advantage.

It should be remembered that during the last decade with the limited protection of the manufacturing clause, 51 book manufacturers went out of business and 23 were merged or acquired and 3 are to be closed at a later date.

The manufacturer of books requires the purchase of very expensive printing equipment, such as the high-speed, long-run web offset press, but at the same time, return on net worth to the industry has only been

in the 5- to 8-percent range in the past decade.

Based on available data, it is clear that the amount of foreign manufactured books imported into the United States is increasing at an alarming rece. In examining the 8-year period between 1967 and 1974, it is apparent that the value of imported books has increased at a considerably faster rate than domestic production, as measured by the BMI composite and the Standard & Poors publishing industry composite. Book imports of all sorts has increased from 69.3 million in 1967 to 150.7 million in 1974, according to the U.S. Department of Commerce figures. This represents a rise in the market share penetration of imported books from 2.5 percent to 3.7 percent of the U.S. market. Remember, this all occurred with the limited protection of the manufacturing clause.

The reason for this rapid increase is a growing practice of the U.S. publishing industry in investing or placing business abroad. In addition, it is also clear that although the present high ratio of exports of domestic manufactured books to imports of foreign manufactured books is this, a repeal of the manufacturing clause will change the situation quickly, since foreign publishers traditionally have never used U.S. manufacturers. This, of course, may add to the current balance-of-payments problems and in addition, severely dam-

age our industry.

In conclusion, I would like to state that based on the above facts, we submit that a repeal or a further weakening of the manufacturing clause will have a disastrous effect upon our industry at a time when there is a necessity for an increased volume of printed material, and a need to utilize a skilled labor force to meet these demands. However, in the spirit of reform and recognizing the long and arduous history of compromise of differing economic interests concerning this issue, the book manufacturing industry states its support for section 601, as it presently appears in H.R. 2223.

Mr. Owen. Mr. Chairman, we would like to submit the full text of our statement for the record, as presented to Mr. Fuchs 2 days ago.

Mr. Kastenmeier. Without objection, your full statement will also be accorted.

[The prepared statement of Jack B. Sandler follows:]

STATEMENT OF JACK B. SANDLER, CHAIRMAN OF THE GOVERNMENT RELATIONS COMMITTEE OF THE BOOK MANUFACTURERS INSTITUTE, INC.

My name is Jack B. Sandler and I am Group Vice President of Sales, for the Book Division of W. A. Krueger Company, New Berlin, Wisconsin. Today I am appearing on behalf of the Book Manufacturers Institute (BMI) located in Ridgefield, Connecticut. I am presently serving as Chairman of the Government Relations Committee of BMI.

The BMI is a trade association representing approximately 80% of all companies in the United States engaged in the manufacture of books, which includes the pre-press preparation, printing and binding of books.

I would like to thank the Committee for allowing me to testify here today

on behalf of the members of BMI.

At the outset, I wish to emphasize the general support of the BMI for H.R. 2223 and the need for a revision and modernization of the Copyright Law in the United States.

With this in mind, let us consider an important provision of the bill which the BMI strongly supports and which has a great importance to the economic future of the book manufacturing industry in this country.

SECTION 601, THE MANUFACTURING CLAUSE

Since 1891, as the result of legislative compromise, there has been a "manufacturing clause" in some form under our Copyright Law. The present manufacturing clause is contained in Section 16 of Title 17 of the United States Code and is supplemented by Section 107.

Basically, Section 16 originally required as a condition to copyright that books in the English language be manufactured from type set, plates made and by

a process wholly performed within the United States.

As the result of implementing legislation authorizing the participation of the United States in the Universal Copyright Convention of 1955, the manufacturing clause was weakened and resulted in the present version of Section 16 which generally provides that books by American authors, or by foreign authors, residing or domiciled in the United States, in the English language, as a condition of copyright must be manufactured and printed from type set, plates made and by process wholly performed within the United States.

Section 601 of the bill represents a further liberalization of the manufacturing clause and constitutes a compromise version developed after long study and effort by the publishers, book manufacturers, trade unions and a succession of House and Senate Committees in previous sessions of Congress. Let us now consider the reasons for the desirability of Section 601 and a manufacturing clause

in general.

I. THE COPYRIGHT MONOPOLY

A strange marriage of crafts is sheltered under the cloak of copyright, namely, authors, publishers, manufacturers and trade unions. The purpose of a copyright is to grant a monopoly in the sense the copyright takes away from the printer the power to control the multiplication and distribution of printable works. Indeed, it was against printers that the Statute of Anne, on which our copyright law was based, purported to protect authors. Thus, recognizing that the selection of a book manufacturer to produce copies of a copyrighted work creates an exclusive right to reproduce and distribute copies of that work is essential in understanding the impact of the manufacturing clause on our book manufacturing industry. In effect, the manufacturing clause allows the government to say to the publisher: "We will grant you a monopoly to sell and distribute this work, but as a condition of granting you that monopoly, we want you to have the product produced in this country by United States manufacturers and United States workers."

Section 601 and the present version of the manufacturing clause impose a reasonable limitation on the power of the copyright owner to select and exclude who shall benefit from his monopoly. The Copyright Law g. .nts the power of monopoly and the manufacturing clause as a part thereof, limits it, both in the public interest.

Those who argue the elimination of the manufacturing clause under the guise of free trade misunderstand the concept of the copyright monopoly. Granting unlimited monopoly within the United States to foreign manufactured books obtained under the Universal Copyright Convention does not bolster free trade since at the same time, the requirements for obtaining a monopoly within the United States has been accomplished and hence, a restraint on domestic trade has resulted. Thus, this issue should not be solely construed as a classic confrontation between free trade and protecting domestic interests. The essential question is whether Congress may impose reasonable limitations and conditions on the grant

¹⁸ Anne. C. 19 (1710), Great Britain.

The Manufacturing Clause of the U.S. Copyright Law, Copyright Office, Library of Congress, February, 1963.

of a monopoly, namely a copyright, in order to provide domestic printers a limited measure of protection admittedly lost when a copyrighted book is manufac-

tured by a foreign competitor.

Recognizing that the manufacturing clause is not solely a free trade issue it should be emphasized that the needed protection for our domestic book manufacturing industry is not provided now, and is not likely to be provided in the future under the United States tariffs. Indeed, tariffs prior to February 1, 1967 had been minimal and on most books have been removed entirely as the result of P.L. 89-651 (October 14, 1968) and Presidential Proclamation No. 3754 (November 3, 1966, 3 CFR, 1966 Comp. p. 90) which implemented the "Florence Agreement" by the United States. It should be noted that the United States removed all tariffs on books and educational materials covered by the "Florence Agreement," including imports of these items from countries which to date have not signed the Agreements. During this decade, it should not be overlooked that foreign countries, while generally granting copyright protection to United States manufactured books, impose many kinds of import barriers, currency controls, and similar restrictive devices comparable to the manufacturing c' rse. Therefore. the existing manufacturing clause and the proposal contained in Section 601 are not an unreasonable limitation on the granting of copyright protection and would not present an undue burden on free trade.

II. ECONOMIC JUSTIFICATION FOR THE MANUFACTURING CLAUSE

The historical basis for the manufacturing clause was and still is economic. It is common knowledge that the cost of both skilled and unskilled labor in the book manufacturing industry in Europe and Asia is less than the fully comparable cost in the United States. We support the testimony of the International

Allied Printing Trades Association on this point.

In addition, it is important to note that in the printing industry in the United States, labor costs constitute a higher percentage of total manufacturing costs than in most other industries. As an example, a comparison of data reported by the Department of Commerce, 1972 Census of Manufacturing, indicates that production payroll cost in the book manufacturing industry equals 44.5 percent of total reported value added by manufacture as compared to only 29.7 percent for all U.S. manufacturing generally. In other words, production worker wage costs when related to value added by manufacture are 50 percent higher in bookprinting than the average for all U.S. manufacturing.

Generally, our industry has a considerable quality and productivity leadership over foreign manufacturers. However, a number of European and Asian countries have begun to improve their manufacturing facilities through investment in advanced high speed equipment comparable or identical to United States technology and are capable of eventually matching their products with United States standards of service and quality. However, since our industry is really a service oriented industry that is dependent in large part upon the quality of our labor force which represents a substantial percentage of our manufacturing cost as demonstrated above, it is imperative to recognize that labor cost differentials are severe to our industry for competitive purposes. Further, understanding that our products are in a sense a unique service product, dependent upon our high standards of quality and service, it appears inconsistent to penalize our industry which must bear certain heavy "social costs" in the form of OSHA compliance, EPA standards, and other regulatory programs, by allowing foreign produced products manufactured under less expensive social conditions and wage differentials, to compete with our products in the United States.

In view of the manufacturing cost advantage of foreign competitors in the form of differentials in Uni ed States and foreign labor costs, and hence destructive competition which our industry may not otherwise combat, the effect on our industry of an unrestrictive flow of foreign manufactured books into the United States would obviously be devastating. Section 601 would provide our industry with a limited and reasonable measure of protection against the clearly dis-

parate economic situation.

As mentioned earlier, economic justification is the main issue behind the retention of the manufacturing clause. This rationale was summarized by two previous Congressional Committees supporting an identical version of Section 601 as follows:

'The real issue that lies between Section 601 and complete repeal is an economic one, and on purely economic grounds the possible dangers to the American printing industry in removing all restrictions on foreign manufacturing outweigh the possible benefits repeal would bring to American authors and publishers."

We submit, the economic justifications responsible for the existence of the manufacturing clause under present law clearly exist today and support the proposed Section 601.

III. THE IMPACT ON THE PRINTING TRADE LABOR FORCE

It is undisputed that in the United States, labor conditions are far superior to those in foreign countries as was illustrated earlier by the disparity in wages between our industry and that of European and Asian countries. This high standard enjoyed by our labor force is obviously dependent upon a healthy and enduring industry, continuing capital investment and improvements. Our industry has always evidenced those qualities and all indicators point in that direction

As discussed earlier, with tariffs gone, a repeal of the manufacturing clause will remove the only protection afforded our industry from devastating foreign competition. Without the manufacturing clause, investment and risk-taking would be discouraged and increased unemployment would result. It should be remembered that during the last decade, 51 book manufacturers have gone out of by siness, 23 have merged or been acquired and 3 are to be closed at a later date. The manufacture of books requires the purchase of very expensive printing equipment such as the high speed, long run webb offset press. But, at the same time, return on net worth in the industry has only been in a 5% to 8% range in the past decade.

Thus, it can be seen that the manufacturing clause is important. Failure to economically compete in the marketplace caused by repeal of the clause will obviously cause a lecline in the production of our industry with a corresponding reduction in the labor force employed in the manufacture of domestic books. This possibility unfortunately is real and may not be capable of reversal under current disparities between the production costs of our industry and our for-

eign competitors.

Thus, in these times of economic uncertainties and under conditions where it is imperative that our skilled labor force be employed to meet our national commitments, it is clear that a easonable protection for our existing domestic labor force in the form of the manufacturing clause contained in Section 601 should be retained.

IV. EFFECT ON IMPORTS OF ENGLISH LANGUAGE BOOKS

Based on available data, it is clear that the amount of foreign manufactured books imported into the United States is increasing at an alarming rate. In examining the eight-year period between 1967 and 1974, it is apparent that the value of imported books has increased at a considerably faster rate than domestic production as measured by the BMI Composite and the Standard and Poor's Publishing Industry Composite. Book imports of all classes have increased from \$69.3 million in 1967 to \$150.7 million in 1974 according to U.S. Department of Commerce figures. This represents a rise in market share penetration of imported books from 2.5% to 3.7% of the U.S. Market. And remember this all occurred with the limited protection of the manufacturing clause!

The reason for this rapid increase is the growing practice of the United States publishing industry in investing or placing business abroad. In addition, it is also clear that although the present high ratio of exports of domestic manufactured books to imports of foreign manufactured books exists, a repeal of the manufacturing clause would change this situation quickly since foreign publishers traditionally have never used United States manufacturers. This of course may add to the current balance of payments problems and in addition, severely damage our industry.

Thus, retention of the manufacturing clause contained in Section 601 is essential to insure the favorable ratio of exports of domestic manufactured books to imports of foreign manufactured books and the corresponding bene-

ficial effect upon our current balance of payments situation.

³ House of Representatives' Report No. 2237, 89th Cong., 2nd Session, October 12, 1966, at pp. 162-163; Senate Report No. 983, 93rd Cong., 2nd Session, July 3, 1974, at p. 196. It is important to note that this Congressional review and conclusion spanned a period of eight years, thus bolstering a clear economic justification for the necessity of the manufacturing clause.

V. EROSION OF THE MANUFACTURING CLAUSE

As we mentioned at the outset, a manufacturing clause has been contained in our Congright Law since 1891. The original language of this clause has been repeatedly liberalized and weakened over the years, with the latest revision occurring in 1954. The current language of Section 1° of Title 17 of the United States Code was the result of the 1954 liberalization.

During the course of various Congressional deliberations on the general revision of our Copyright Law subsequent to 1954, the issue of repealing or weakening the manufacturing clause was considered. During this period spanning approximately 10 years, the publisher groups, major authors' group, and a number of indirectly interested fringe groups sought to have the manufacturing clause repealed. These proposals were repeatedly rejected and a compromise version of the manufacturing clause was adopted by a series of Congressional Committees with the agreement of the affected groups. This compromise version is now before this distinguished Committee embodied in Section 601 of H.R. 2223.

The major erosion of the manufacturing clause represented by Section 601 is the exemption for American nationals domiciled abroad for at least one year and the removal of the absolute loss of copyright protection upon noncompliance with the manufacturing clause. Other liberalizations are present including the increase to 2,000 in the number of books which may be imported under the exemption from the clause with an elimination of the special "ad interim" time limits and registration requirements of the present law, and an increase in the number of exemptions from the clause for specified types of use. Under subsection (c) of Section 601, importation of reproduction proofs would be permitted, as well as computer tapes from which plates can be prepared, representing a major liberalization of the manufacturing clause.

It is therefore clearly agreed by the groups affected by the manufacturing clause that Section 601 represents a further erosion of its effectiveness. However, the compromise achieved in support of Section 601 is recognized by our industry, and in the spirit of mutual cooperation among the differing interests affected by this issue, and for purposes of legislative compromise, we strongly submit that section 601 should be favorably considered by this distinguished Committee.

CONCLUSION

Based on the above facts, we submit that a repeal or a further weakening of the manufacturing clause will have a disastrous effect upon our industry at a time when there is a necessity for an increased volume of printed material, increased production and investment demands and a skilled labor force to meet these demands. However, in the spirit of reform and recognizing the long and arauous history of compromise of differing economic interests concerning this issue, the book manufacturing industry herewith states its support for the present Section 601 as proposed in H.R. 2223, subject to a technical amendment and clarification in the Committee Report to be proposed hereafter.

TECHNICAL AMENDMENT AND CLARIFICATION TO SECTION 601

I. WORK FOR HIRE, FOREIGN SUBSIDIARY OF DOMESTIC EMPLOYER

For the purpose of preventing possible abuses in the "work for hire" exemption of Section 601(b)(1), we respectfully request that the following language be added to the last clause of Section 601(b)(1) so it reads as follows:

"* * *; in the case of work made for hire, the exemption provided by this clause does not apply unless a substantial part of the work was prepared for an employer or other person who is not a national or domiciliary of the United States or a domestic corporation or enterprise or a foreign subsidiary or affiliate thereof." (New language italic.)

II. LITEBARY MATERIAL

The interpretation of the term "literary material" may be capable of conflicting interpretations by administrators charged with enforcing the manufacturing clause. Indeed, under present law, the interpretation as to what types of work

⁴ Section 601 of H.R. 2223 is identical to Section 601 of S. 1361 reported by the Senate Committee on the Judiciary, July 3, 1974, 93rd Cong., 2nd Session and is very similar to Section 601 of H.R. 4847 and S. 597 considered by the 89th and 90th Congresses.

were covered under the clause has been inconsistent and at times conflicting. Thus, for the purpose of accurately reflecting the legislative intent concerning the definition of the term "literary material" as used in Section 601 of the bill, we respectfully request that the Report of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice to accompany H.R. 2223 include language applicable to the definition of "literary work [material]" contained in the last sentence of the third full paragraph appearing on page 17 of the House of Representatives Report No. 83, 90th Congress, 1st Session, March 8; 1967, with revisions so it reads as follows:

"The term literary material' does not connote any criterion of literary merit or qualitative value; it includes catalogs, directories and similar material."

III. PREPONDERANTLY OF NONDRAMATIC LITERARY MATERIAL

Finally, we also request that the House Committee Report include language to aid in the definition of "preponderantly" as it relates to nondramatic literary material in Section 601(a) of the bill. Since the language in Section 601 of the companion bill, S. 22, is similar, it might be helpful to use similar language o that contained in the Senate Committee Report (Sen. Report No. 983, 93 d Congress, 2d Session, July 3, 1974, p. 197).

We would respectfully request that the following three paragraphs be included

in the House Committee Report to aid in later application of the Section:

"The scope of the manufacturing requirement, as set out in subsections (a) and (b) of section 601, is considerably more limited than that of present law. The requirements apply to 'a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title,' and would thus not extend to: dramatic, musical, pictorial, or graphic works; foreign-language material; or works consisting preponderantly of material that is not subject to the manufacturing requirement.

"A work containing 'nondramatic literary material that is in the English language and is protected under this title,' and also containing dramatic, musical, pictorial, graphic, foreign-language, public domain, or other material that is not subject to the manufacturing requirement, or any combination of these, is not considered to consist 'preponderantly' of the copy right-protected nondramatic English-language literary material unless such material exceeds the exempted material in importance. Thus, where the literary material in a work consists merely of a foreword or preface, and captions, headings, or brief descriptions or explanations of pictorial, graphic or other non-literary material clearly exceeds the literary material in importance, and the entire work is free of the manufacturing requirement.

"On the other hand, work which contains both non-dramatic literary material and pictorial, graphic or other non-literary material is subject to the manufacturing requirement if the non-dramatic literary material is necessary to convey the ideas or information being presented, regardless of the relative amount of space occupied by each kind of material. In such a case, the existence of a narrative or exposition means that the non-dramatic literary material plainly exceeds the non-literary material in weight, or importance, in the work and the work is therefore subject to the manufacturing requirement even though it has ϵ high pictorial

or graphic content."

[The subcommittee received the following statements letters for the record:]

STATEMENT BY TOWNSEND HOOPES, PRESIDENT ASSOCIATION OF AMERICAN PUBLISHERS

Mr. Chairman, my name is Townsend Hoopes. I am President of the Association of American Publishers, a trade association comprising the great majority of publishers of general books, textbooks and educational materials. Its more than 260 members, including many university presses and religious book publishers, produce in the aggregate more than 80% of all general, educational and religious books and materials published in the United States.

We are grateful for the opportunity to express our views on set another section of the Copyright Revision Bill, Section 601, the Manufacturing Clause.

The Association is on record before this committee in support of the bill as it is now written. We extend this support to the manusacturing clause, although with certain minor reservations. In principle we are opt ted to any type of trade restrictions which impede the free flow of educational and cultural materials. At the same time we recognize the political realities of the present situation, and accordingly accept and support the present language of Section 601 in the interests of facilitating passage of the bill as a whole. We do express the hope that this section can be eventually eliminated from the statute, as it constitutes a continuing temptation to developing countries to impose a variety of protectionist measures that work generally to restrict the international flow of information and educational materials.

U.S. COUNCIL FOR AN OPEN WORLD ECONOMY, INC., Washington, D.C., September 4, 1975.

REPEAL THE "MANUFACTURING CLAUSE" OF THE COPYRIGHT LAW

(By David J. Steinberg, President, U.S. Council for an Open World Economy)

The copyright law's "manufacturing clause," Arst enacted in 1891 and liberalized several times over the past 84 years, basically requires (with certain exceptions) that a person desiring full U.S. copyright protection for a book in the English language must have that book manufactured in the United States. Referred to by its supporters as a justifiable condition to the granting of a monopoly, the "clause" is in fact a trade barrier with Buy American features. It does not belong in the copyright law at all, whether or not justifiable as economic policy. To the extent that it has had any economic justification, it should be only a marginal, transitional part of a coherent policy of government assistance to an industry whose problems and needs have been carefully diagnosed. This has never been U.S. practice regarding this or any other trade barrier.

Repeal of the "manufacturing clause" is a long overdue reform that belongs in the copyright law revision now being considered by Congress. The slight modifications of the "clause" in the current bill, whatever their merits, are not enough. The best course would be total repeal of the "clause," or at least the programing of repeal—scheduling it to take effect perhaps a year or two from the date of enactment of the new legislation (though not precluding interim e...orcement of what-

ever improvements now in the bill are adopted).

The decision to repeal, worthy for its own sake, could be helpful in inducing other countries to discontinue certain practices in reding U.S. exports, but should not be made conditional on such concessions. It could (and should) set in motion a coherent government assessment of the strengths and weaknesses of the printing industry and the most constructive form of government assistance, if assistance is needed at all.

Retaining the "manufacturing clause" in one form or another is not only a barrier to commerce. It is also (by seeming to respond to the problems of the printing industry) a barrier to direct, constructive attention to the real needs of the industry for whose benefit this aged protectionism has been kept on the books. It is also a barrier to American authors unable to find publishers in the United States, and a barrier to American publishers eager for greater flexibility with which to achieve greater efficiency and greater market opportunities.

It is long past time to free the copyright law, the book writers and the publishing industry from this encumbrance. It is time for enlightened attention to the best interests of all the people whose lives and livelihoods are affected by this issue—the needs of the printing industry no less than those of anyone else.

(This statement presents the writer's personal views and does not necessarily, in every detail, reflect the views of the U.S. Council for an Open World Economy or the Council's trustees. The Council is a nonprofit organization engaged in research and public education on the merits and problems of achieving an open international economic system.)

Counthan, Casey & Loomis, Washington, D.C., October 24, 1975.

Re: H.R. 2223, Copyright Bill.

HERB FUCHS, Esq.,

Counsel, House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, Rayburn Building, Washington, D.C.

DEAR HERB: We understand that you will probably only have one more day of hearings on H.R. 2223 (Ms. Barbara Ringer will testify as Register of Copyrights on October 30, 1975) and then the Subcommitte will go to mark-up.

Mr. Hocher and I appreciated very much the opportunity to meet with you on September 12, 1975 to discuss some of the technical aspects of the manufacturing clause issue which we did not have adequate time to present in our oral testi-

mony before the Subcommittee on September 18, 1975.

I thought this might be a good time to re-express our interest in three technical issues involving the manufacturing clause in Section 601 of the bill. At pages 12 to 14 of our statement (enclosed), note the three technical issues involving (1) "work for hire, foreign subsidiary of domestic employer", (2) definition of term "literary material", and (3) definition of the term "preponderantly" as it relates to nondramatic literary material.

We would respectfully request that these three clarifications be made in the Committee Report or possibly in the form of technical amendments to the bill

itself if you feel that is more appropriate.

Should you have any questions on this, we would be glad to answer them.

With best regards. Sincerely,

Stephen F. Owen, Jr., General Counsel, Book Manufacturers' Institute.

STATEMENT REGARDING THE CANADIAN EXEMPTION, SUGGESTED FOR INCLUSION IN THE COMMITTEE REPORT

Canada is specifically exempted from the provisions of Section 601, the so called "manufacturing clause" of the bill. This exemption is included as a result of an agreement reached in Toronto in 1968 among representatives of American and Canadian publishers, printing trade unions and book manufacturers. Upon addition of the Canadian exemption in American legislation, that agreement contemplates Canadian adoption of the Florence Agreement, prompt removal of the punitive Canadian tariffs on printed matter and the removal of other Canadian restraints on printing and publishing trade between the two countries. The Canadian exemption is included in Section 601 in the expectation that these changes will be made. If for any reason Canada does not move promptly to carry out its obligations under the Toronto Agreement, we would expect Congress to remove the Canadian exemption.

Mr. Kastenmeier. I would again remind the witnesses that there are time limitations. I don't like to break into your presentations, but if you are unaware of your time limitation, Mr. Fuchs, our counsel, will be happy to inform you. I say this because it is our hope to cover four subject areas this morning, and we cannot do so if people exceed the time allotted to them.

I would now like to call Mr. Irwin Karp, counsel, Authors League of America, Inc.

TESTIMONY OF IRWIN KARP, COUNSEL, AUTHORS LEAGUE OF AMERICA, INC.

Mr. Karp. Mr. Chairman, I ask that our complete statement be included in the record, and I will try to summarize in the time allotted to me the points made by the Authors League on the manufacturing clause.

The restrictions and penalties of the manufacturing clause apply to two classes of work; namely, books and periodical contributions, and only to those authorized by U.S. citizens and domiciliaries.

The rights of these authors are used as hostages to compel prolishers to manufacture U.S. editions of books by American authors in this country. Forfeiture of the author's rights here is the penalty for noncompliance.

Your committee, in 1967, concluded that there is no justification on principle for the manufacturing clause and recommended its ulti-

mate repeal. The Authors League agrees. It urges the clause be phased

out of the Copyright Act no later than the end of 1982.

The league reluctantly accepts the new version of the clause in section 601 as a compromise. It eliminates some injustices, and properly allows manufacture in Canada. But it still inflicts harsh restraints and injury on American authors of books who publish abroad.

We recommend two changes in the clause, which will eliminate some of those damages to these authors; injuries which do not even

serve the purpose of the clause.

Our statement also discloses the reasons why the clause is unconstitutional, probably, because its arbitrary and discriminatory classifications violate the fifth and first amendments. Time being short, I will not summarize those.

I do wish to call your attention to the two changes we recommend in section 601, on page 5 of our statement. The first would exempt from the manufacturing clause copies of an American author's book which were produced abroad by a foreign publisher to actually publish the work outside the United States and was not a citizen or domiciliary of the United States. More than 2,000 copies, under these circumstances, could be imported without forfeiting protection

of the author's U.S. publishing rights.

The purpose of the manufacturing clause is to compel publishers to manufacture U.S. editions. Primarily, the purpose, as a previous speaker pointed out, is to prevent U.S. publishers from sending works abroad for printing and other manufacturing activities. But American authors do not have books published abroad by foreign publishers in order to deprive U.S. printers of work. American authors publish abroad because they reside there, or because they cannot find an American publisher.

The manufacturing clause cannot wring blood from this stone. It is therefore pointless to prohibit U.S. authors, whose works are published abroad, from having more than 2,000 copies of these works

from being distributed to American readers.

The restriction in this area simply denies them the right to reach the American public, or compels them to forfeit protection for their U.S. publishing rights in order to get those books into the country. It must be emphasized that while the new clause would not destroy U.S. author's copyrights completely as the present clause does, it still deprives American authors protection for their publishing rights if more than 2,000 copies are imported.

Most American authors derive all of their income solely from their publishing rights. So this modification, while laudatory, is probably

useless to 80 or 90 percent of the American authors.

I thank you for the opportunity of presenting this brief statement. [The prepared statement of Irwin Karp follows:]

STATEMENT OF IRWIN KARP, COUNSEL, THE AUTHORS LEAGUE OF AMERICA

SEC. 601-"THE MANUFACTURING CLAUSE"

Mr. Chairman, my name is Irwin Karp. I am counsel for the Authors League of America, the national society of professional writers. The Authors League appreciates this opportunity to state its views on the "manufacturing clause"—Sec. 16 of the present law, and Sec. 601 of the Copyright Revision Bill. A majority of the League's members write books, and poems, stories, articles and

other contributions to periodicals. The restrictions and penalties of the "manufacturing clause" apply only to these classes of copyrighted works, and only to those authored by United States citizens or domiciliaries.

Although American authors are primary victims of the manufacturing clause, they are innocent casualties of an economic conflict between publishers and the American printing industry and unions. The present clause, and the proposed modification, seek to compel publishers to manufacture U.S. editions of American authors' books in this country. Both use the author's rights as a hostage for

that purpose.

As your Committee's 1967 Report stated, "there is no justification on principle for a manufacturing requirement in the copyright statute . . ." Sec. 601 is a "compromise" provision. As your Committee recommended, the clause ultimately should be repealed. The Authors League agrees. It believes that the manufacturing limitations should be phased out of the Copyright Act, eliminated before a specified date-e.g. December 31, 1982. Although Sec. 601 eliminates some inequities of Sec. 16, it nonetheless imposes harsh and unjustifiable restrictions on American authors' rights. Moreover, both sections may violate the Fifth and First Amendments. And the Authors League believes that changes should be made in Sec. 601 to eliminate pointless injury to American authors.

THE PRESENT LAW

Sec. 16 prevents an American author from securing U.S. copyright in a book or periodical contribution if the first edition is manufactured abroad. If ad interim copyright is secured, the author has a 5 year reprieve to have an edition manufactured and published here. Failing that, all U.S. protection is lost. Sec. 16 also deprives American authors of all U.S. protection if foreign-made copies are distributed here, even though U.S. copyright was previously secured by publishing an American-made edition in this country. Many American authors have been deprived of U.S. copyright protection by the manufacturing clause.

THE REVISION BILL

Sec. 601 would eliminate some of the onerous provisions of Sec. 16. American authors would obtain U.S. copyright in books and other nondramatic literary material, whether manufactured here or abroad. The new manufacturing requirements would be satisfied by production in the United States or Canada. And the Authors League strongly supports the inclusion of Canadian manufacture as some relief from the limitations that remain in Sec. 601.

Sec. 601 still imposes manufacturing restrictions on the rights of American authors of books and other nondramatic literary material. No hore than 2,000 foreign-made copies may be imported. If additional copies are distributed here with the author's permission, e loses protection for his U.S. publishing rights. Anyone could publish his book without his permission, and without paying him. Protection against further infringements can only be recovered by publication of an authorized edition manufactured here or in Canada.

Importation of more than 2,000 copies would not completely destroy an American author's copyright, as Sec. 16 now provides. The right to make motion picture or television versions, and other non-publishing rights would not be impaired. But most American authors of books earn their income solely from their publishing rights. Thus, the new clause would continue to penalize those U.S.

writers whose books were published abroad.

THE DAMAGING EFFECTS OF SEC. 601

American authors do not have their books published abroad in order to have the printing done more cheaply. The production of a book, including the printing, is the publisher's responsibility. The publisher, not the author, selects the printer and negotiates the price for manufacturing the book; the publisher, not the author, pays this and the other costs of production.

American authors turn to foreign publishers when they reside, work or study abroad. They choose publishers in the same country because the relationship is too personal to conduct at long distance. Sec. 601 recognizes this reality by exempting from its restrictions all foreign authors and any American author domiciled abroad for more than one year preceding importation and distribution of foreign-made copies of his book in this country. There is another reason why American authors turn to foreign publishers—they cannot find an American

publisher willing to issue their books.

Sec. 601 would deny many of these authors the right to disseminate their works to American readers. An author who published abroad, and could not find an American publisher to issue his book here, would be barred from distributing more than 2,000 foreign-made copies—on penalty of losing protection against infringing editions.

Moreover, Sec. 601 would deny some American authors protection for their U.S. publishing rights, Foreign publishers sometimes may insist, as a condition for accepting a manuscript, on authorization to export copies to this country; and will manage to distribute them here. American authors who must publish abroad would thus face two alternatives: (i) granting that authorization, and losing protection against infringing American editions; or (ii) denying authorization, losing the sole opportunity of publication which the foreign publisher represents. Other American authors, ignorant of the manufacturing requirements, will grant foreign publishers these export rights. Sec. 601 will prove, as Sec. 16 has, a trap for unwary U.S. writers.

THE MANUFACTURING CLAUSE AND THE FIFTH AMENDMENT

The classification of authors and types of works subject to the manufacturing clause is so arbitrary and discriminatory that it well may violate the Fifth Amendment. Shapiro v. Thompson, 394 U.S. 618 (1969) repeated this quotation from two prior opinions:

"[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497

(1954). [at. p. 642]

In Shapiro v. Thompson, the Court ruled unconstitutional an Act of Congress which established a one-year residence requirement for welfare assistance in the District of Columbia, because the discrimination involved in the statutory plan of classifying new and old residents violated the Due Process Clause of the Fifth Amendment. In Schneider v. Rusk, the statute was held to violate the Due Process Clause because it dis iminated between two classes of American citizens who resided abroad, favoring the native born over the naturalized.

Sec. 601 (and Sec. 24) impose two sets of discriminatory classifications on one class of American authors. First, American authors of books are subjected to their restrictions and penalties. Sec. 601 exempts from those provisions all foreign authors (except those domiciled here). Under Sec. 9 of the present law: British, French, Soviet and other authors from the nations belonging to the Universal Copyright Convention are exempt from the restrictions of Sec. 16 (except those domiciled here). Under Sec. 601, and the present law, books in English by these foreign authors, made abroad, may be imported and distributed in the United States—without any limitation on quantity, without any diminution of U.S. publishing or other rights.

This utter discrimination finds no justification in the Copyright Clause of the Constitution which authorizes the granting of exclusive right(s) to "Authors", without excluding any nationality. Nor does the discrimination and justification in economic reality. Books by foreign authors, when sold in this country, can be made here or abroad. Importation of foreign-manufactured copies of books by those authors will deprive American printers of the work they would

have if the copies were produced here.
Second, the manufacturing clauses unjustly discriminate between American authors of books (and periodical contributions) and all authors of other classes of copyrighted works. American and foreign producers of film and television programs (the "author" for copyright purposes) can manufacture these works abroad and import unlimited numbers of copies into the United States without impairing the complete protection of all of their rights under the U.S. Copyright Act. Foreign-made copies of sheet music, records, graphic works and other copyrighted works—by American authors—also can be imported into the United States without diminishing the protection afforded by our copyright statute.

There is no constitutional justification for this arbitrary discrimination against

American authors of books and other literary works. In its last Americanent of the Copyright Act dealing with Sec. 16, the Congress found that foreign manufacture of books in English no, longer, represented any threat to the "domestic printing industry." (No. 2608, 83rd Cong.; 2d Sess., p. 3631)

By contrast, the production abroad and importation of motion pictures and television programs, by American "author" producers, has had a serious effect on American workers engaged in the production of such copyrighted works.

THE MANUFACTURING CLAUSE AND THE FIRST AMENDMENT

As we have noted, Sec. 601 (and Sec. 16) would effectively prevent some American authors from disseminating their works in the United States. Only books, and only those by American authors, are singled out for this restraint. This "legislative classification is strikingly underinclusive." Eranozzik v. City of Jacksonville, U.S. Supreme Court (June 23, 1975; 422 U.S. 205, 215). Although a legislature may, ordinarily, "deal with one part of a problem without addressing all of it" said the Court,

"This presumption of statutory validity, however, turns upon the subject matter of expression. 'Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. of Chicago v. Mosley, 408 U.S. at

The manufacturing clause, new version and old, restricts the distribution of certain works because of their form—applying to books but not to films, television or radio programs, pictures or illustrations. The clause restricts the distribution of books because of the nationality or domicile of the author. Books by American authors are restricted, books by foreign authors are not. These restrictions curtail the author's right to disseminate his books, protected by the First Amendment. Smith v. California, 361 U.S. 147 (1959); Bantam Books v. Sullivan, 372 U.S. 58 (1963). The restrictions of the manufacturing clause, discriminatory and "underinclusive", violate the First Amendment as well as the Due Process Clause of the Fifth Amendment.

CHANGES IN SECTION 601

As we have noted, the primary purpose of the manufacturing clause is to compel book publishers to manufacture here the copies they distribute in this country. That purpose is not served by prohibiting the importation of foreign-made copies of books by American authors which are published abroad by foreign publishers American authors do not have their works published abroad to obtain lower printing costs, or to deprive American printers of work. Those consequences occurred an American publishers arranged for the foreign composition and printing of books they produced for sale in the United States. So long as the manufacturing clause remains in the Copyright Act, it should be limited to those circumstances. Therefore, the Authors League recommends that Sec. 601 (b) be amended by adding a new clause reading:

"(7) where the copies were produced by a publisher who had previously published the work outside the United States and is not a national or domiciliary

of the United States or a domestic corporation or enterprise."

This clause would permit the American author who had published his book abroad, by a foreign publisher, to authorize the importation and distribution of that publisher's copies in the United States without limitation on the number of

copies, and without losing protection for his publishing or other rights.

The Authors League also recommends that Sec. 601 be amended to exempt periodicals and contributions to periodicals. Many foreign periodicals are sold here from their original, foreign-made editions. They are not even subject to the manufacturing clause if they do not contain contributions by American authors. And the pressure of the manufacturing clause will not compel them to print in this country the copies they sell here. Its only effect can be to deny American authors the opportunity of having their contributions published in those periodicals. Indeed, one of the primary consequences of the clause is to deprive American authors of work opportunities in various areas. For example, American publishers frequently have contracted for the foreign production of art books, children's books and other works requiring good-quality color photographs or illustrations. Under Sec. 601, this practice would not be restricted so long as the publisher hired a British, Australian or other foreign author (from a U.C.C. country) to write the text. For Sec. 601 does not apply to foreign production of graphic material, and would not apply where the text was written by such a foreign

Mr. Kastenmeier. Thank you. Actually, we have some questions of the witnesses. Mr. Karp, would you remain at the table, and perhaps

we will have Mr. Strackbein and Mr. Van Arkel and Mr. Sandler join you for any questions that the committee may have.

PANEL DISCUSSION: MR. STRACKBEIN, MR. VAN ARKEL, MR. SANDLER, AND MR. KARP

Mr. Kastenmeier. For a country that holds itself out as having freedom of the press and freedom of speech and peoples with various ideological persuasions, is it consistent for us to deny foreign publications into this country by using this economic device in the copyright law to limit or, in fact, prohibit equal protection for such copyright materials, Mr. Karp?

Mr. Van Arkel. May I address myself to that?

Mr. Kastenmeier. Yes.

Mr. Van Arkel. There is presently no law of any kind that prohibits any foreign publisher from sending into the United States any number of books that he desires to send in. We are not talking about a limitation on books or other periodicals into the United States. We are talking about the conditions under which such a foreign publisher can achieve a monopoly by law of the entire American book economy. We think that the Congress has not only the right, but the duty, to see to it that there are reasonable conditions on the grant of this copyright and that the use of the manufacturing clause is a totally appropriate means to that end.

Mr. KARP. May I answer the question, which you addressed to me,

Mr. Chairman?

Mr. VAN ARKEL. I am sorry. I didn't know I was interrupting.

Mr. Karp. Oh, you weren't. I hadn't started yet.

Mr. Chairman, the answer to your question is obviously that it is not proper for the Congress of the United States to enact a statute, which it has done, which prevents foreign editions of works from American authors from entering the country. I think it violates the first amendment. The classifications in the present law and in the bill are so inclusive and so arbitrary and so discriminatory as probably to fall under the first amendment.

Moreover, it ill-behooves the labor unions to sit here talking about an author's monopoly. If it weren't for a particular section of the Clayton Act, every union in this country would be illegal as a monopoly.

ton Act, every union in this country would be illegal as a monopoly. Third, if the Department of Justice were able to sue Congress for violating the antitrust laws, they would be suing you for enacting the manufacturing clause. They have a suit going against American publishers right now for conspiring with British publishers to keep foreign editions of books out of this country. And a most effective method of keeping those books out of this country is the clause we are discussing today.

Mr. Kastenmeier. Thank you. Mr. Van Arkel, are there not other means or devices than the manufacturing clause in the copyright law, such as tariffs and duties on foreign publications, which ought to govern as an economic matter, whether it is protectionist or not, that ought

to govern in this area?

Mr. VAN ARKEL. If I may, I would like to refer to my original statement for the history of the introduction of the manufacturing clause,

the reasons for its enactment, and how it was derived. I really think that alternatives, and I haven't given much thought to the alternatives, but I think clearly there would be difficulties with the GATT Treaty with the imposition of tariffs and with the Florence agreement.

As I say, I haven't thought this subject matter through, but I can foresee that an effort to find alternatives would lead to far more confusion and difficulty than the continuation of what has been the law

for a number of years.

Mr. Kastenmeier. At this point, I would like to yield to Mr. Railsback.

Mr. Railsback. No questions.

Mr. Kastenmeier. The gentleman from Massachusetts.

Mr. Drinan. I want to thank all of you gentlemen for your statements, and I raise the question whether or not this manufacturing clause violates the Helsinki agreement. I read that very carefully, and toward the end there are several sections about the diffusion of knowledge and the guarantee that we will not block access to knowledge in any language. I wonder whether anybody would want to make a judgment on that?

Mr. Karp, would you feel that Helsinki supports your case? It is a

new argument for you, I hope.

Mr. Karp. No; I am not arguing with you. I wish I was better prepared to agree with you.

Mr. Drinan. It is a new argument I am offering you. Go ahead. Mr. Karp. I think you are right in principle, but I haven't prepared myself on the Helsinki agreement to comment in detail.

Mr. Drinan. It might be a very good argument for you.

Mr. KARP. I will certainly look at it.

Mr. Drinan. Any of you other gentlemen?

Mr. Van Arkel. I can only reiterate, Mr. Drinan, what I alre dy stated. There is presently no law of any kind-on the books which prohibits, in any manner, the importation of books into this country. To that extent, I think it is completely consistent with the freedom which the Helsinki agreement talks about in its agreement, and really goes beyond what that agreement contemplates. I can only emphasize that you are talking here not about free trade, not about free exchange; you are talking about the grant of an American monopoly of this market through copyrights. Now, there is certainly nothing in the Helsinki agreement that says that this country has got to give an unconditional amount of access to this market to all foreign publishers, whoever they may be.

Mr. Drinan. Let me quote to you from a manual on copyright law

done by Arthur Hansen. This is his conclusion, on page 150:

In general, most experts find no logic in denying copyright protection to authors as a means of protecting printers against foreign competition. In fact, all groups concerned—with the possible exception of the printers—appear to agree that manufacture in the United States should not be a condition of copyright.

Anything to comment on that?

Mr. Van Arkel. I disagree with that very firmly.

Mr. Drinan. Name some groups, besides the printers.

Mr. Van Arker. I can only ask that you read my statement for the reasons—

Mr. Drinan. I did, sir. I read it last night, and I reread it again this morning. I have practically memorized it. But give me somebody be-

sides the printers. I mean, you disagree with it, but he said "with the possible exception of the printers." Well, are there other groups?

Mr. VAN ARKEL. One of the staunchest supporters was a former Register of the Copyrights, Mr. Sam Warner, who wrote at length on this, and testified against it very strongly.

Mr. Drinan. Well, he is not exactly a whole class of people. He is just

a former Register of the Copyrights.

Mr. Van Arkel. Well, he is a well qualified expert. Mr. Drinan. Mr. Karp, do you want to comment?

Mr. KARP. I think that the more recent Registers of Copyrights have disagreed with Mr. Warner. To my recollection, Mr. Kaminstein and

Ms. Ringer both opposed the manufacturing clause.

Mr. Drinan. Would it be your judgment that Mr. Hansen here is correct that all groups concerned, with the possible exception of the printers, appear to agree this is without foundation?

Mr. Karp. I certainly think that is a correct statement.

Mr. Drinan. Thank you.

Mr. Sandler. May I make a statement? Obviously, I was one of those that was referenced as a printer there, so I am not addressing myself to that portion of it, but I quickly scanned the testimony by Mr. Hoopes. I think he is stating a compromise. I think I want to refer this committee to his testimony.

Mr. Drinan. Well, is that the compromise already in the bill?

Mr. Sandler. No, I mean recognizing the need of a compromise on the parts of the opposed parties and the fact that there is a need, at least on a temporary basis, for the manufacturing clause.

Mr. Drinan. Is he recommending a compromise different from

section 601 now, which is a compromise?

Mr. Sandler. No.

Mr. Drinan. Would you state in your terms, sir, how 601 is a compromise? Mr. Karp says it is a compromise, but give us, if you would,

the two or three things that you think compromise 601?

Mr. Sandler. Well, there is the opportunity for books to come in. Certainly, it does not restrict these books from coming in. There are portions of manufacturing that it is my understanding can still be done in foreign countries. My understanding is plates—well, identification of these products may have some misnomers. We say "plates" in letterpress type terms. We talk about type-setting, reproduction, these types of things. Now, these types of things are allowed to be brought in.

Mr. Drinan. And does it phase out at a moment in time?

Mr. Sandler. No.

Mr. Drinan. You recommended that, Mr. Karp, but that is not in 601?

Mr. Karp. No, it isn't. We also recommend a very important thing which I think you gentlemen ought to consider seriously. This is a fight between American publishers and American printers, and we are in the middle. We have been in the middle for over 50 years, and it is unconscionable. What goes abroad and what they are really concerned about is the American publisher who sends abroad printing work on a very big, multicolored book, for example, where the setting or the illustrations or the color work is too expensive to do here. And American publishers shop around. They used to send it to Switzerland

and they sent it to Italy and now they are sending it to Japan. Ironically, that is not literary material and they can do that, under the new law. That is where the loss of business is.

No American publisher takes a 250-page novel, or a 300-page biography and ships it abroad in order to get the printing done cheaper. That is ridiculous. It may happen, but if it does it happens rarely.

But, what they are doing is saying to the American author of a novel or the author of a biography that if you can't find an American publisher, and if you have to go abroad, if you are James Joyce or even Ernest Hemingway, and you are living in Paris and you publish abroad, you can't have that publisher send copies into this country. And the only reason that those copies come in, in most cases, is because the American author abroad or here can't even find an American publisher to put the book out. All that remains in this clause of significance to American authors is they still lose their publishing rights if those copies are imported. And as you pointed cut, Mr. Chairman, that is an obvious restriction on the fundamental right to distribute work in this country, to bring in intellectual works into this country. And it is only imposed on American authors. And they ought to accept at least this change because it doesn't hurt them one bit. It still keeps the clause in place, which I don't like either, but it still keeps the clause in place to protect them against the American publisher who is going to bring out an American edition and deliberately ships the printing work abroad. That is what they are really concerned about. That is the culprit.

And they shouldn't be insisting that when an American lives abroad or sends abroad to have a book published, because it is the only place they can find a publisher, they shouldn't be insisting that any number of copies of that foreign-copy edition be brought into this country, because, by God, nobody sent that abroad in the first place to cheat their

members of their union or their constituent manufacturers.

Mr. KASTENMEIER. If the gentleman would yield? Do you think

there should be an insistence on this?

Mr. VAN ARKEL. If I understood the proposal correctly, and this is the first time I heard it, I think it would be far simpler to say we are going to repeal the manufacturing clause.

Mr. KARP. Well, I will accept that one, too.

Mr. Drinan. Mr. Chairman, on section 601, music is exempted and

it is not covered. Has anybody complained about that?

Mr. Karp. Everything is exempt except books. Any motion picture producer, American motion picture producer, can go to France or Italy and make a movie with foreign labor and import any number of copies of that film into this country and secure copyrights. And the damage done to the craft unions of California is probably much greater than is done to the printing trades in this country, but that isn't prohibited. The only class of copyright work that is covered by this clause are books and contributions to periodicals, and only if written by American authors. And I really think that if we went to court, the U.S. Supreme Court might well say that is such an arbitrary classification, that this classification is so discriminatory, that it violates the due process clause of the fifth amendment. And I cited cases in my statement where the court has said that. And I wonder whether

the Judiciary Committee of the U.S. House of Representatives shouldn't consider that seriously. And I don't think it behooves the Judiciary Committee to pass a piece of legislation that may well be unconstitutional.

Mr. Drinan. Just one last piece of information. Would the chairman tell me what the 1967 bill from this committee included? Mr. Karp says in that report you people stated, "There is no justification in principle for the manufacturing requirement."

Was section 601 of the manufacturing clause, was that completely

out of that bill?

Mr. Kastenmeier. No, it was not. As a matter of fact, and I think the gentlemen who are witnesses here are more knowledgeable than the Chair on this, my recollection is that bill is very much like 2223.

Mr. Karp. The report talks of the clause as it would be under 601,

Mr. Drinan. It still says that is not justifiable in principle.

Mr. Drinan. But the committee recommended that the clause ul-

timately should be repealed. Is that in the original-

Mr. Kastenmeier. No, the point of the report, while it suggested disaffection for that clause, but mindful that compromises and conciliations have already taken place, and that the clause as represented in this bill—and I am talking about 1965, 1966, 1967—but rather than to go and outright repeal it, or something else, that subcommittee at that time accepted more or less the language in 2223, but expressing this as a point of view.

However, the point of view was not written into the bill. In other words, if I understand the law, the present law exempts 1,500 copies and the bill exempts 2,000 copies. This particular proposal exempts Canadian publications, I think. I am not sure whether our bill did in

1967, did it?

Mr. KARP. No. That is a change.

Mr. Kastenmeier. That is a change. And there may be certain other changes you have indicated in terms of typography and so forth that I am not clear on. I am not clear on the technical changes between H.R. 2223 and the present law. Perhaps Mr. Sandler or Mr. Van Arkel could enlighten the committee as to precisely what changes are represented from present law and 2223, from the present text?

Mr. Van Arkel. Well, I think-

Mr. Kastenmeier. Does anyone at the table have knowledge on that?

Mr. Van Arkel. Well, I think you touched on the important ones, Mr. Chairman.

Mr. Drinan. Mr. Chairman, I would just urge these two contending parties have a long lunch and study their difficulties on section

601 and come to the best compromise they can make.

Mr. Strackbein. May I say, the impression seems to be entertained by some people that this manufacturing clause would prevent the importation of books, this language, from abroad. Of course, it does nothing of the kind. It is only if they want to enjoy a copyright in this marker that they must manufacture in this country. Mr. KASTENMEIER. Yes, I think everyone understands that.

Mr. Strackbein. In other words, if you want to manufacture abroad, you have access to this market, but you don't get the copyright.

Mr. Kastenmeier. Do I understand the effect of the present law is to enable foreign book manufacturers and publishers to import into this country 1,500 editions, which are protected by copyright, and then having tested the market, they may not thereafter import more into this country, but then they would have tested the market for an Amer-.ican manufacturer and that-

Mr. Strackbein. That is correct.
Mr. Van Arkel. No, there is no prohibition on importing any number he wants to. The only consequence is that, if he imports more than 2,000, as provided in this bill, he will not receive later copyright protection. He has a 5-year period of testing the market to find out whether or not he wants to put out an edition in the United States.

Mr. Strackbein. I think the 5 years is not in this bill.

Mr. Kastenmeier. But the bill is predicated on the notion that copyright protection for authors for publishing and, indeed, as affects book manufacturing, is an essential economic protect on.

I yield to the gentleman from California.

Mr. Wiggins. This is addressed to any one of the gentlemen who can answer this question. Do the copyright laws of other countries contain similar restrictions?

Mr. Karp. I don't know of any Western European country; I don't

know of any country that has a manufacturing clause.

Mr. Van Arkel. Mr. Chairman, the British, and I feel quite sure other countries as well, have the exact equivalent of a manufacturing clause for copyrights. That is to say, in order to achieve a patent on anything, on any invention, you must manufacture in Great Britain or some other country in order to retain your patent.

Mr. Wiggins. Do you disagree with the gentleman with respect to

copyrights, however?

Mr. Van Arkel. I know of no other country that has a similar provision with respect to copyright; no.

Mr. Kastenmeier. The gentleman from New York?

Mr. Parrison. I think we have pretty much exhausted the subject, but let me just follow up the notion you can import all you want, but all you lose is your copyright protection. Wouldn't the effect of that be that anybody who imported, let us say, 3,000 copies and thereby lost his copyright protection after the 2,000 copies, the effect of that, wouldn't it be, that any printer or any person could simply copy that book and sell it without any liability?

Mr. Van Arkel. Well, Mr. Congressman, if we didn't think this clause had some economic effects, we wouldn't be here in support.

Mr. Patrison. So that, in effect, really, as a practical matter, it does prohibit the importation of more than 2,000 copies?

Mr. VAN ARKEL. No, it prohibits nothing.

Mr. Pattison. I understand it doesn't actually prohibit it, but in effect it prohibits it?

Mr. VAN ARKEL. Well, in effect, it says you may not have a monopoly in the American market if you import more than 2,000 copies.

Mr. KARP. Mr. Pattison, may I respond to that? It is obvious that when an act of Congress inhibits somebody from acting because of a severe penalty if he acts, then it acts the same as a restraint. The Supreme Court decisions are full of examples of self-censorship, of coercing somebody into not doing something because of the serious

damage he might suffer. And more than one ac. of Congress or the State legislatures has been stricken down because it were ed and caused self-censorship. And that is precisely what this law does. An American author who has a book published abroad can't bring in more than 2,000 copies for fear of losing his copyright. Under the present example, he can only bring in 1,500, if he gets an ad interim copyright. It is the most effective form of restraint there is. Indeed, the bill is written as an absolute prohibition. It says you can't import them and then it implements it by saying that you lose your copyright.

But even assuming it only meant that you lost your copyright, that

is the whole ballgame.

And I do think, as I said before, this word monopoly, which is always bandied about in testimony, you know, a copyright isn't a monopoly in an antitrust sense in the same way a union is but for that exemption of the Clayton Act. And, ironically, the biggest suit in publishing right now is an antitrust suit which deals with this very type of restraint. And here is the most effective restraint of all, that has been enacted by Congress.

Mr. Pattison. Let me just ask one more hypothetical question. We make a lot of paper in my congressional district. Suppose this manufacturing clause was expanded and said it not only had to be printed here but had to be printed on a paper that was manufactured here. Now would that differ in principle from what you are talking about?

Mr. Sandler. I think by stating it had to be printed here, I think to some extent you are including it has to be manufactured on paper

printed here.

Mr. Patrison. No; I realize that is not in the law, but——

Mr. Sandler. No; but the fact of bringing the paper in here, I mean, the paper is here and this is one of the economic advantages, as opposed

to the paper being from Europe. And——

Mr. Pattison. Well, suppose it came from Taiwan. Suppose we got really cheaper paper from Taiwan and the paper manufacturers in this country said, "Hey, you are producing books on a lot of paper that is cheaply manufactured in Taiwan." That might is of concern to us in this country.

Mr. Sandler. Well, frankly, I am surprised that the paper industry is not represented here, because I think they have as much an interest as the book manufacturers have. If these books are manufactured in Europe or Taiwan, it is going to be on paper made in those countries.

Mr. Patrison. Maybe I should tell the paper manufacturers in my

district.

Mr. Karp. Mr. Chairman, I might note in response to Mr. Pattison's question that one of the greatest ironies of this clause is that if an author does allow more than 3,000 copies to come in, then copyright is forfeited, and every Taiwanese book pirate and every cheap printer all over the world is perfectly free to copy the book and send it into the United States to compete with this labor.

Mr. Sandler. May I address myself to that, or at least refer to the BMI legal counsel? We discussed this subject this morning, and he is

better prepared to respond to this than I am.

Mr. Owen. I think there is a little misstatement—

Mr. Kastenmeier. Would you identify yourself for the record?

Mr. Owen. Yes; Steve Owen, Counsel for BMI. I think the question here is this bill has been liberalized considerably in effect so that if a person exceeds 2,000 copies into the United States, then at some later period he can resurrect his copyright merely by going to an American book manufacturer and having another edition printed. He immediately gets back his copyright. He doesn't lose it. So that ad interim copyright of the prior language in the law is changed substantially in section 601; the ad interim copyright is out of this bill.

Mr. Karp. I wasn't talking about that, Mr. Chairman. Under this bill as now drawn, and under the present law, once the American author's protection is forfeited, and this bill says it allows 3,000 copies

to be brought in with his authorization-

Mr. Kastenmeier. 2,000.

Mr. Karp. Oh, 2,000. I beg your pardon. I am not trying to get 3,000. That is hardly worth quibbling about. That is not the point.

If 2,000 are brought in with his authorization, he loses his protection, and then anybody can print an infringing edition and that means anybody anywhere. All he can do if he can find an American publisher to print the book, he can only protect himself against further infringements by others. The damage is already done.

And in fact, if the pirates abroad can pour cheap copies into the

country, then no American publisher is going to publish it anyway.

Mr. KASTENMEIER. If the gentleman from New York would yield on that a moment? If a prominent author living in Paris had a Parisian publisher and book manufacturer, and introduced 2,000 copies into this country, and finally an extra 1,000, he would forfeit his copyright in the interim in this country. But, if you were in that situation, presumably, you would have gotten a copyright in France, and those other copyrights would continue to protect the author and publisher in those countries.

Mr. Karp. Not against distribution and cale in the United States. And there are plenty of countries—in fact, the countries with the cheapest labor are the ones that don't necessarily prohibit printing. I mean, Taiwan theoretically has a copyright treaty with us. I am talking about distribution in the United States here. And the prominent American author in Paris has an American publisher who publishes here. That is my point. If you can find an American publisher, then that American publisher isn't going to send abroad for a foreign edi-

tion of a novel or a biography or current history.

This dispute isn't about that and doesn't even involve authors. It is big American publishers who turn out great big fat expensive colored books for distribution here and who send the printing work abroad. Now, that is not the author's problem. And the iron r is that when an American publisher now or under this clause wants to bring those heavily colored books in with the text, he avoids the manufacturing clause completely by hiring himself a Canadian author or a British author or a French or a Russian author to write the text in England and then he doesn't have to comply with that clause. All that happens is that American authors are out of work. I guess if we affiliated with the AFL-CIO, they would have a problem. They wouldn't know which bunch of laborers to protect; either the authors or the printers, because that is just what happens under the manufacturing clause.

Mr. Strackbein. Mr. Chairman, may I make one last observation here. No. 1, that the importation of books free of duty was provided under the Florence Convention. The Congress of the United States, under the trade agreements legislation, had no authority to reduce any duty to zero. By an end-run through the Florence Convention, this was accomplished; that is, completely removing the duty by means of a treaty, thus circumventing the constitutional power of the House to initiate legislation in this field. So they do have free importation of books into this country, without any duty.

Now, that in itself, has certainly liberalized the trade in books. And in fact, as stated in my statement, the importation of books has almost tripled within less than 10 years time. So that actually, from the point of view of the economics of it, the retention of a manufacturing clause is the only thing that is left by way of giving protection to the workers in the printing trades in this country. Other than that, they are bereft

of any further protection.

Mr. Kastenmeter. Any further questions?

Mr. Patitson. No.

Mr. KASTENMEIER. If not, that concludes the testimony this morning on the manufacturing clause.

The committee is indebted to you, Mr. Strackbein, to Mr. Van Arkel,

to Mr. Sandler, and Mr. Karp.

Next, the Chair would like to call the witness on the question of nonsimultaneous recording right for cable system in noncontiguous areas. We have Mr. Lee Holmes, president of Guam Cable TV Co., to be introduced by the Honorable Antonio Borja Won Pat, Delegate from Guam.

TESTIMONY OF HON. WON PAT, DELEGATE FROM GUAM, ACCOMPANIED BY LEE HOLMES, PRESIDENT, GUAM CABLE TV CO.; HIS WIFE, JOAN HOLMES; AND RICHARD L. BROWN, WASHINGTON COUNSEL

Mr. Won Pat. Thank you, Mr. Chairman and distinguished members of the committee. My statement will be very short, and a more comprehensive statement will be made by my constituent, the owner of the cables, Mr. Lee Holmes, who is accompanied by his wife, and his counsel.

Mr. Chairman and honored members of this subcommittee, I appreciate this opportunity to address the need for special copyright provisions to protect the thousands of cable tel "ision subscribers in Guam

Under the 1909 copyright statute currently in force, cable stations in the 48 States have legally been held free of liability for simultaneous transmission of copyrighted programing. This has twice been upheld in the landmark legal decision of Fortnightly Corp. v. Columbia Broadcasting System, Inc.

The cable television system in Guam, however, does not enjoy such protection. Our local system, known as the Guam Cable Television System, does not rebroadcast simultaneously. Because of their great distance from mainland video signals, they retape the programs on

the U.S. mainland for shipment to Guam. Thus, the Guam cable system is forced to enter into the fuzzy world of nonsimultaneous broadcasting—a legal no man's land in which our cable system is constantly

exposed to the threat of litigation:

Previously, I had introduced legislation which would clarify the question of copyright liability for cable television systems located in noncontiguous American areas, such as Guam and Alaska. My bill, H.R. 4965, is similar to the "Stevens amendment" offered by Senator Ted Stevens, of Alaska, to the omnibus copyright bill, S. 22.

[Mr. Won Pat's bill, H.R. 4965, is as follows:]

[H.R. 4965, 94th Cong., 1st sess.]

A BILL For the amendment of the Copyright Law, title 17 of the United States Code

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 17 of the United States Code, entitled "Copyrights", is hereby amended by adding new section 101(f) to read as follows:

- "(f) For all the purposes of the provisions of this title dealing with infringements of copyright, including criminal prosecution pursuant to section 104 of this title, a person shall not infringe or have infringed the copyright in any work protected under the copyright laws of the United States who,
 - "(1) for the purpose of transmission on a noncontiguous area cable television system, has made or shall cause to be made, or has transmitted or shall cause to be transmitted, a videotape of a television program or programs broadcast by one or more television stations licensed by the Federal Communications Commission; and when after the enactment of this subsection:
 - "(i) the videotape is transmitted no more than one time, without deletion of any material including commercials, or any such system;
 - "(ii) an owner or officer of such facility erases or destroys, or

causes the erasure or destruction of such videotape; and

- "(iii) subject to the provisions of subparagraph (2) of this subsection, on or before the end of each calendar quarter, an owner or officer of such system executes an affidavit attesting to the erasure or destruction of all such videotapes made or used during the preceding quarter; and
- and
 "(iv) said owner or officer places or causes said affidavit, or the affidavit received pursuant to section 101(f)(2)(ii) of this title, to be placed in a file, open to public inspection, at such system's main office in the community where the transmission is made or in the nearest community where such system maintains an office.

"(2) Nothing herein shall prevent any such system, pursuant to written contract, from transferring the videotapes to another such system pro-

vided that:

"(i) said written contract is placed in the file, open to public inspec-

tion, required hereunder; and

"(ii) the last such facility transmitting the programs shall comply with the provisions of section 101(f)(1)(ii) through (iv) of this title, and shall

"(iii) provide a copy of the affidavit required hereunder to each such

system making a previous transmission of the same videotape.

"(3) As used in this subsection, the following terms and their variant forms mean the following:

"(i) a 'transmission' is the distribution by a noncontiguous area cable television system of a videotape to its subscribers and is the equivalent of the carriage of broadcast signals for all the purposes of the

rules and regulations of the Federal Communications Commission

"(ii) a 'noncontiguous area cable television' is a facility located in any State, territory, trust territory, or possession not within the boundary of the forty-eight contiguous continental States, that receives signals transmitted or makes or obtains videotapes of programs broadcast by one or more television broadcast stations licensed by the Federal

Communications Commission and delivers such signals or programs by wires, cables, or other communications channels to subscribing mem-

bers of the public who pay for such service.

"(iii) A 'videotape' is the reproduction of the images and sounds of a program or programs, including commercials, broadcast by a television station licensed by the Federal Communications Commission, regardless of the nature of the material objects, such as tapes or motion pictures, in which the reproduction is embodied.

Mr. Won Pat. My sole intent in introducing H.R. 4965 was to assure that users of the Guam cable television system would not live in constant fear that their source of programing would be jeopardized

by litigation.

Several days ago, I learned from Mr. Lee Holmes, owner of the Guam cable system, that his company has successfully concluded an agreement with the Motion Picture Association of America that would effectively resolve the question of copyright infringement and thus negate the need for my legislation. I wholeheartedly support the proposed amendments and request that H.R. 4965 be held in abeyance pending adoption of the new language.

In closing, Mr. Chairman, I ask only that whatever language be adopted provide the viewers of cable television on Guam with protection against program interruption arising from copyright litigation. My appearance here today marks the second time in less than a month I have done so, Mr. Chairman, and the concern for the people of Guam which you and your colleagues on this subcommittee have shown is

greatly appreciated.

I stand ready to answer any questions. Thank you.

Now, I would yield to Mr. Holmes, who will complete the testimony at this moment.

Mr. Kastenmeier. Thank you. I am going to ask Mr. Holmes to hold his testimony pending our return. The committee is informed, and the lights at the rear of the room and the buzzers inform us all, there is a vote taking place on the House floor, which we will have to go to. We will return and reconvene in approximately 15 minutes, and less possibly. I urge my colleagues to return forthwith. Until approximately 11:15, the committee stands in recess.

Recess.]

Mr. Kastenmeier. The committee will come to order. Before we recessed, we heard the introduction of our next witness, Mr. Holmes, by the Honorable Antonio Borja Won Pat.

Mr. Holmes, you are most welcome.

[The prepared statement of Mr. Holmes follows:]

STATEMENT OF LEE HOLMES, PRESIDENT, GUAM CABLE TV SYSTEM

Mr. Chairman, members of the Subcommittee, it is indeed a pleasure to appear before you this morning. My name is Lee Holmes, I am president of Guam Cible TV System; seated on my right is my wife, Joan Holmes, a director and secretary

of the Corporation, and to my left is Richard L. Brown, our Washington counsel.

Guam Cable TV System operates a CATV system on Guam. It carries the offthe air signals of two local stations, one is an educational station and one is a commercial station, KUAM-TV. Our company has approximately 150 shareholders, approximately 80% of which are Guamanians. Our company was developed with the financial assistance of the Guam Economic Development Authority. Therefore, not only are we a local service organization, but we are deeply rooted in our community.

Guam Cable TV System currently has approximately 12,000 subcribing families and we estimate that nearly 50,000 Guamanians view CATV programming on the system every day (the present population of Guam is approximately 100,000

persons).

Guam is 9,090 miles from Washington, D.C. Distance is the fact that has given rise to our special CATV problem. Ordinarily, CATV picks broadcast television signals out of the air and delivers them to subscribing customers. Sometimes this process is aided by use of microwave, which allows the transportation of broadcast signals for thousands of miles. However, the distance factor for Guam makes microwave unavailable as a practical matter and requires programs to be taped in the continental United States and then physically transported to Guam. It does not appear that satellite can cver be a solution to our special problem because of the time zone factor; that is, such transmissions would not be viewable at an appropriate time in Guam. For example, a satellite transmission of the Johnny Carson Show would take place in the late afternoon on Guam. Similarly, satellite transmission of, Captain Kangaroo would take place in the wee hours of the morning.

The citizens of Guam should be able to receive the same television programming as is available to citizens located in counterpart markets in the contiguous states. Thus, Guam which is considered a smaller market under the Rules and Regulations of the FCC is entitled to the *full* programming of each of the three national networks, the programming of one independent station and the programming of at least one educational station. This programming is now provided to CATV sub-

scribers in Guam through the mechanism of videotaping.

When the companion bill of ER 2223 was pending in the Senate in 1974

When the companion bill of HR 2223 was pending in the Senate in 1974 (S. 1361), it provided for the payment by CATV of specified copyright fees under a compulsory license. A compulsory license would be the equivalent of consent without the necessity for obtaining that consent in each case. In the consent without the necessity for obtaining that consent in each case. In the words, copyright holders by virtue of having authorized television stations to broadcast their material, would be deemed to have consented to CATV carriage. Prior to the addition of language which has come to be known as the "Stevens Amendment", the offshore systems that taped programing, i.e., in Guam and Alaska, would not have received compulsory licenses. Thus those systems were placed in an inferior position to cable systems located in the contiguous states. We have always viewed the "Stevens Amendment" as equity legislation designed to place the citizens of distant areas on the same footing as those in the forty eight contiguous states. That is, if the Congress decided to pass copyright legislation involving CATV, the provisions of such legislation should apply to the noncontiguous areas such as Guam.

Under the "Stevens Amendment", which imposes compulsory licenses on off-

Under the "Stevens Amendment", which imposes compulsory licenses on offshore systems, the Senate did away with the administrative and costly nightmare program by program and system by system negotiations entailed. Essentially, this is what the compulsory license of § 111 for mainland systems is all about in the

first place.

As you know, S. 1361 did not get enacted into law and the bill was reintrocal as S. 22 in the Senate and is now pending before you as HR 2223. After passage of S. 1361 in the Senate, Guam Cable TV System continued to operate under threats of lawsuits; and in face of opposition to the "Stevens Amendment" by the Motion Picture Association, the National Association of Broadcasters and one or more networks. While we were happy that the Senate agreed with our position, and we believed that the House would also, we had no certain understanding of the length of time required for deliberation of the omnibus copyright bill in the House, and its enactment into law, and whether § 111 (CATV copyright liability) would be included. With great uncertainty as to our continuing ability to serve the residents of Guam and other areas of the Trust Territory of the Pacific, Mr. Won Pat, our Representative, introduced HR 4965, a bill that we hoped would expeditiously settle this very narrow copyright question by putting us in the same exact footing as mainland CATV systems.

Fortunately, Mr. Won Pat's bill contained many provisions that met the concerps of the copyright holders. With this in mind, our counsel arranged a meeting between Mr. Valenti and me in which we discussed the CATV system in Guam and set to work on amendments largely derived from Mr. Won Pat's bill, which we proposed to this committee. These amendments would perfect the "Stevens Amendment" and satisfy those seeking (1) payment for use of their product and

(2) protection of the integrity of that product; and would also satisfy those seeking a compulsory license under the proposed copyright law for use of that product.

Thus, the proposed legislation would, among other things, accomplish the

1. Apply the criminal provisions and other remedies of the copyright act to violations of the taping authority for the offshore systems affected;

 Provide for only one time transmissions of the videotapes on the CATVs;
 Prohibit deletion or editing of programs including the commercials that are contained within the story line of the programs. This would not affect the existing practice of deleting or otherwise altering or substituting commercial content at the beginning and end of programs;

4. Those systems engaged in taping must prevent the duplication of the tapes while in the system's possession and while in the possession of the taping facility and must take adequate precautions to prevent duplication while being transported. The system is also required to erase or destroy the tape or cause such erasure or destruction and to attest to the fact by an affidavit of an owner or officer of the CATV involved. Such affidavits must be kept open to public

inspection in a public file at its office;
5. CATV transmissions must be those that would be permitted under the pertinent FC: Rules and Regulations if made by a system that were not taping. Importantly, because of (1) the complexity of FCC Rules and Regulations, (2) the likelihood that such regulations may from time to time be changed, and (3) the problems involving notification, proposed section (e) (1) (F) is explicitly inapplicable to inadvertent or accidental transmissions. This is designed specifically to insure against the institution of nuisance suits under the copyright law.

Paragraph (e) (2) applies similar restrictions to the process of sharing tapes among CATV systems to insure that such tapes do not find their way out of the CATV chain of distribution. It would also allow for cost sharing of the full costs attendant in making tapes available, i.e., costs of tape, production costs and delivery costs. Finally, Paragraph (e)(3) indicates that the legislation is not meant to supersede any existing agreements concerning exclusivity protec-

tion provided to broadcast stations.

It is our opinion that the adoption of the proposed amendments in HR 2223 would fully resolve our CATV/copyright problem and would avoid the necessity for any consideration at this time of Hk 4965 legislation, Mr. Won Pat's bill. We believe this agreement among the parties constitutes a good faith effort to arrive at a reasonable solution to a complex problem. Our experience in the last several weeks indicates that a forthright and hardworking approach to settle this matter has been entered into and achieved and we urge this Com-

mittee's adoption of the proposed amendments.

As you know, the residents of the northern Marianas have vot to join the United States as a Commonwealth. The bill that would confer such status has passed the House and is now pending in the Senate. When it passes, they will join the people of Guam as our westernmost American citizens-6,000 miles off the California coast. As Americans in the world today, their freedom of speech includes access to television, our most widely distributed medium. We have all played a part in the proposed legislation and we believe enactment of these

vital amendments will meet the daily need of these Americans.

Thank you for this opportunity to testify and I would be delighted to answer any of your questions.

Mr. Holmes. Mr. Chairman and members of the subcommittee, it is indeed a pleasure to appear before you this morning. Mr. name is Lee Holmes; I am president of Guam Cable TV System; seated on my right is my wife, Joan Holmes, a director and secretary of the corporation; and to my left is Richard L. Brown, our Washington counsel. Guam Cable TV System operates a CATV system on Guam. It car-

ries the off-the-air signals of two local stations; one is an educational station, and one is a commercial station, KUAM-TV. Our company has approximately 150 shareholders, approximately 80 percent of which are Guamanians. Our company was developed with the financial

assistance of the Guam Economic Development Authority. Therefore, not only are we a local service organization, but we are deeply rooted in our community.

Guam Cable TV system currently has approximately 12,027 subscribing families and we estimate that nearly 50,000 Guamanians view CATV programing on the system every day—the present population

of Guam is approximately 100,000 persons.

Guam is 9,000 miles from Washington, D.C. Distance is the fact that has given rise to our special CATV problem. Ordinarily, CATV picks broadcast television signals out of the air and delivers them to subscribing customers. Sometimes this process is aided by the use of microwave relay which allows the transportation of broadcast signals for thousands of miles. However, the distance factor for Guam makes microwave unavailable as a practical matter and requires programs to be taped in the continental United States and then physically flown to Guam. It does not appear that satellite can ever be a solution to our special problem because of the time zone factor; that is, such transmissions would not be viewable at an appropriate time in Guam. For example, a satellite transmission of the Johnny Carson show would take place in the late afternoon on Guam. Similarly, satellite transmission of Captain Kangaroo would take place in the wee hours of the morning.

The citizens of Guam should be able to receive the same television programing as is available to citizens located in counterpart markets in the contiguous States. Thus, Guam which is considered a smaller market under the rules and regulations of the FCC is entitled to the full programing of each of the three national networks, the programing of one independent station, and the programing of at least one educational station. This programing is now provided to CATV subscribers in

Guam through the mechanism of videotaping.

When the companion bill of H.R. 2223 was pending in the Senate in 1974, S. 1361, it provided for the payment by CATV of specified copyright fees under a compulsory license. A compulsory license would be the equivalent of copyright consent without the necessity for obtaining that consent in each case. In other words, copyright holders by virtue of having authorized television stations to broadcast their material, would be deemed to have consented to CATV carriage. Prior to the addition of language which has come to be known as the Stevens amendment, the offshore systems that taped programing, that is, in Guam and Alaska, would not have received compulsory licenses. Thus those systems were placed in an inferior position to cable systems loeated in the continguous States. We have always view the Stevens amendment as equity legislation designed to place the citizens of distant areas on the same footing as those in the 48 contiguous States. That is, if the Congress decided to pass copyright legislation involving CATV, the provisions of such legislation should apply to the noncontiguous areas such as Guam.

Under the Stevens amendment, which imposes compulsory licenses on offshore systems, the Senate did away with the administrative and costly nightmare program by program and system by system negotiations entailed. Essentially, this is what the compulsory license of

section 111 for mainland systems is all about in the first place.

As you know, S. 1361 did not get enacted into law and the bill was reintroduced as S. 22 in the Senate and is now pending before you as H.R. 2223. After passage of S. 1361 in the Senate, Guam Cable TV system continued to operate under threats of lawsuits; and in face of opposition to the Stevens amendment by the Motion Picture Association, the National Association of Broadcasters and one or more networks. While we were happy that the Senate agreed with our position, and we believed that the House would also, we had no certain understanding of the length of time required for deliberation of the omnibus copyright bill in the House, and its enactment into law, and whether section 111, which is CATV copyright liability, would be included. With great uncertainty as to our continuing ability to serve the residents of Guam and other areas of the Trust Territory of the Pacific Islands, Mr. Won Pat, our Representative, introduced H.R. 4965, a bill that we hoped would expeditiously settle his very narrow copyright question by putting us in the same exact footing as mainland CATV systems.

Fortunately. Mr. Won Pat's bill contained many provisions that met the concerns of the copyright holders. With this in mind, our counsel arranged a meeting between Mr. Valenti and me in which we discussed the CATV system in Guam and set to work on amendments largely derived from Mr. Won Pat's bill, which we proposed to this committee. These amendments would perfect the Stevens amendment and satisfy those seeking (1) payment for use of their product and (2) protection of the integrity of that product; and would also satisfy those seeking a compulsory license under the proposed copyright law

for use of that product.

Thus, the proposed legislation would, among other things, accom-

plish the following:

1. Apply the criminal provisions and other remedies of the copyright act to violations of the taping authority for the offshore systems affected.

2. Provide for only one time transmissions of videotapes on the CATV's.

3. Prohibit deletion or editing of programs including the commercials that are now contained within the story line of the programs. This would not affect the existing practice of deleting or otherwise altering or substituting commercial content at the beginning and end

of the programs.

4. Those systems engaged in taping must prevent the duplication of the tapes while in the system's possession and while in the possession of the taping facility and must take ade uate precautions to prevent duplication while being transported. The system is also required to erase or destroy the tape or cause such erasure or destruction and to attest to the fact by an affidavit of an owner or officer by the CATV involved. Such affidavits must be kept open to public inspection in a public file in its office.

5. CATV transmissions must be those that would be permitted under the pertinent FCC rules and regulations if made by a system that were not taping. Importantly, because of (1) the complexity of FCC rules and regulations, (2) the likelihood that such regulations may from time to time be changed, and (3) the problems involving notification, proposed section 111(e) (1) (F) is explicitly inapplicable to inadvertent

or accidental transmissions. This is designed specifically to insure against the institution of nuisance suits under the copyright law.

Paragraph (e) (2) applies similar restrictions to the process of sharing tapes among CATV systems to insure that such tapes do not find their way out of the CATV chain of distribution. It would also allow for cost sharing of the full costs attendant to making tapes available, that is, costs of tape, production costs, and delivery costs. Finally, paragraph (e) (3) indicates that the legislation is not meant to supersede any existing agreements concerning exclusivity protection provided to broadcast stations.

It is our opinion that the adoption of the proposed amendments into H.R. 2223 would fully resolve our CATV/copyright problem and would avoid the necessity for any consideration at this time of H.R. 4965 legislation, Mr. Won Pat's bill. We believe this agreement among the parties constitutes a good faith effort to arrive at a reasonable solution to a complex problem. Our experience in the last several weeks indicates that a forthright and hard-working approach to settle this matter has been entered into and achieved, and we urge

this committee's adoption of the proposed amendments.

As you know, the residents of the northern Marianas have voted to join the United States as a Commonwealth. The bill that would confer such status has passed the House and is now pending in the Senate. When it passes, they will join the people of Guam as our westernmost American citizens—6,000 miles off the California coast. As Americans in the world today, their freedom of speech includes access to television, our most widely distributed medium. We have all played a part in the proposed legislation, and we believe that enactment of these vital amendments will meet the daily needs of these Americans.

Thank you for this opportunity to testify and I would be delighted

to answer any of your questions.

Mr. Kastenmeier. Thank you, Mr. Holmes. The Chair knows that there has been an exchange of correspondence on this issue and there are, for example, a letter from Mr. Valenti to Mr. Holmes dated September 10; a letter from Mr. Valenti to the Chair dated September 11; a letter from Mr. Brown to Mr. Valenti, dated September 12; a letter from Mr. Brown to the Chair, dated September 15; a letter from Mr. Brown to Mr. Won Pat dated September 15. Without objection, these communications will be placed in the record, and the thrust of these communications is to affirm what Mr. Holmes has suggested; namely, that the parties have resolved their dispute and have agreed to amendments varying somewhat from H.R. 4965.

The above-referred to documents and a letter from Mr. Valenti

to the Chair, dated September 30, 1975, follow:]

Motion Picture Association of America, Inc..
Washington, D.C., September 10, 1975.

Mr. Lee M. Holmes, President, Guam Cable TV System, Tamuning, Guam.

DEAR LEE: In our endeavor to be helpful in meeting the special geographical problem of Guam, as you are aware we have worked out with your Washington counsel, Richard Brown, Esq., who has consulted with you, an amendment to the provision dealing with nonsimultaneous secondary transmissions presently contained in Section 111 of H.R. 2228.

The text of the proposed modifications, which we trust will be acceptable to the congressional subcommittee considering copyright, is attached herewith although I assume your counsel has forwarded it to you. We believe, and Mr. Brown concurs, that the proposed language would meet your needs and we, as copyright owners, are agreeable to advising Chairman Kastenmeier and the Members of his subcommittee at the scheduled hearing on September 18, 1975,

that the proposal is also acceptable to us. An understanding has been reached with Mr. Brown that you, or Mr. Brown as your attorney under your direction, will as soon as possible and prior to the hearing date, (a) write the Honorable Antonio Borja Won Pat, Delegate from Guam, advising him that modifications to the copyright bill have been agreed upon between us that make the Won Pat Bill (H.R. 9301) unnecessary and asking him to so advise Chairman Kastenmeier; and (b) write Chairman Kastenmeier, with copies to the members of his subcommittee that an agreement has been reached by you with the copyright holders for language changes in the bill that are acceptable to both parties and that under the circumstances you have asked your congressional delegate not to press his bill.

I am sending a copy of this letter to Chairman Kastenmeier and to the members of the subcommittee so that they will be informed of the facts. In a covering letter, I will ask the Chairman to give friendly consideration to the amendment which we have jointly agreed upon. We will confirm this position formally at the

subcommittee hearing on September 18.

I am pleased that you and I had the opportunity to meet personally on this problem and as a result I made a special point of explaining your situation to the members of the MPAA committee that is responsible for copyright matters. The end result has been helpful and I hope that we can persuade the subcommittee that the best interests of all the parties, and especially the people of Guam, are being served. I look forward to receiving copies of your letters to Mr. Won Pat and Chairman Kastenmeier promptly.

Sincerely.

JACK VALENTI, President.

Enclosure.

MOTION PICTURE ASSOCIATION OF AMERICA, INC., Washington, D.C., September 11, 1975.

Hon. ROBERT W. KASTENMEIER. Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

MY DEAR MR. CHAIRMAN: Throughout the congressional consideration of the copyright bill, it has been my policy to conciliate and make concessions in an earnest endeavor to expedite the enactment of a bill that all of the parties can live with. However, as you and your colleagues are aware, I found it necessary in my testimony before your committee to note our opposition to the language in Sec. 111 of H.R. 2223 that was carried over from the Senate bill that permits nonsimultaneous transmissions to be classified as simultaneous transmissions - for certain non-contiguous United States areas. The provision, known as the "Stevens Amendment" does violence to the essence of copyright integrity, as Ms. Barabra Ringer, the Register of Copyrights, has pointed out, hence our opposition.

Nevertheless, it has been my personal feeling that Guam, situated more than 5,000 miles from the mainland and more than 3,000 miles from the nearest state, Hawaii, with only one commercial television station that operates for a limited

number of hours, is deserving of special consideration.

I have sought, therefore, to meet with sympathy and a concern for the welfare of the residents of Guam, the problems presented to me by Mr. Lee Holmes in behalf of the Guam Cable system, a facility that serves some 9,000 homes on the Island. I also have taken into consideration Mr. Holmes' expressed desire to undertake cable operations on the Islands of Tinian and Saipan where scheduled military installations will bring in large numbers of American military families in the future.

Attached is a draft of an amendment to Section 111, jointly worked out and approved by Mr. Holmes and his Washington counsel and ourselves in behalf of the copyright owners. We trust that it will meet with your approval and that of the Members of your subcommittee and we bespeak your friendly consideration of it. A copy of my letter to Mr. Holmes, confirming our understanding and agreement is also attached for your information.

With great respect and affection.

, Sincerely,

JACK VALENTI,

President.

LAW OFFICES OF RICHARD L. BROWN, Washington, D.C., September 12, 1975.

Mr. JACK VALENTI, President, MPAA, Washington, D.C.

DEAR JACK: I received your letter forwarding a copy of the proposed amendments to HR 2223. I spoke to Lee Holmes last night, who concurs that the agreement will provide a workable and equitable solution to the special problems of CATV transmissions in Guam and the Trust territory. Your suggestion to inform the subcommittee membership as soon as possible is a good one and I am forwarding a copy of my letter to you to each of the subcommittee members. I am also asking Chairman Kastenmeier for favorable consideration of the proposed amendments.

amendments.

I will also write Mr. Won Pat; I believe that he will be delighted to know that the parties have been able to reach an agreement that will be beneficial to thousands of Guamanians and that adoption of the proposed amendments would alkeviate the necessity for HR 4965. On behalf of Lee and myself, thank you for cooperating in this matter. The opportunity to reason this out together was both productive and enjoyable. Ed Cooper and Larry Monaco did a superb job in drafting the proposed amendments.

Very truly yours.

RICHARD L. BROWN, Counsel for Guam Cable TV System, Inc.

LAW OFFICES OF RICHARD L. BROWN, Washington, D.C., September 15, 1975.

Re H.R. 2223.

Hon. ROBERT W. KASTENMEIER.

Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I am writing on behalf of Guam Cable TV System concerning testimony scheduled for September 18, 1975, relating to the so-called "Stevens Amendment." It has always been the position of Guam Cable TV System that an accident of geography—great distance from the contiguous states—should not make offshore CATV viewers second class citizens. That is, viewers are entitled to the full compliment of programming available to counterpart viewers in the contiguous states. Hence, passage of the so-called "Stevens Amenalment" by the Senate last year in S 1361

ment" by the Senate last year in S. 1361.

Recently, Guam Cable TV System and the Motion Picture Association of America, Inc. have had several discussions concerning CATV operations in Guam and the Trust Territory of the Pacific. The MPAA has recognized our problems and we have recognized theirs. We propose to the Committee the language set forth in the attachment hereto. Also enclosed is an exchange of correspondence between my client and the Motion Picture Association of America, Inc. concerning the proposed amendments to HR 2223. In light of these facts. I am also writing to Mr. Won Pat asking him not to press for passage of HR 4965.

We hope that the Subcommittee will give favorable consideration to the proposed amendments which will be the subject of our testimony.

Very truly yours,

RICHARD L. BROWN.

PROPOSED AMENDMENTS TO H.R. 2223

On page 17, between lines 18 and 19, insert the following:

(e) Nonsimultaneous Secondary Transmissions By Cable Systems.—

(1) Notwithstanding those provisions of the second paragraph of subsection

(f) relating to nonsimultaneous secondary transmissions by a cable system, any such transmissions are actionable as an act of infringement under section 501, and are fully subject to the remedies provided by sections 502 through 506, unless:

(A) the program on the videotape is transmitted no more than one time

to the cable system's subscribers; and

(B) the copyrighted program, episode, or motion picture videotaped, including the commercials contained within such program, episode, or pic-

ture, is transmitted without deletion or editing; and
(C) an owner or officer of the cable system (i) prevents the duplication
of the videotape while in the possession of the system, (ii) prevents duplication while in the possession of the facility making the videotape for the system, (iii) takes adequate precautions to prevent duplication while the tape is being transported, and (iv) subject to paragraph (2), erases or destroys, or causes the erasure or destruction of, the videotape; and

(D) within 45 days after the end of each calendar quarter, an owner or officer of the cable system executes an affidavit attesting (i) to the steps and precautions taken to prevent duplication of the videotape, and (ii) subject to paragraph (2), to the erasure or destruction of all videotapes

made or used during such quarter; and

(E) such owner or officer places or causes each such affidavit, and affidavits received pursuant to paragraph (2)(C), to be placed in a file, open to public inspection, at such system's main office in the community where the transmission is made or in the nearest community where such system maintains an office; and

(F) the nonsimultaneous transmission is one that the cable system would be authorized to transmit under the rules, regulations and authorizations of the Federal Communications Commission in effect at the time of the nonsimultaneous transmission if the transmission had been made simultaneously, except that this clause shall not apply to inadvertent or accidenta!

transmissions.

(2) If a cable system transfers to any person a videotape of a program nonsimultaneously transmitted by it, such transfer is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, except that any cable system in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands may transfer, pursuant to a written, nonprofit contract providing for the equitable sharing of the costs of such videotape and its transfer, a videotape nonsimultaneously transmitted by it in accordance with paragraph (1), to another cable system in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands, if:

(A) each such contract is available for public inspection in the offices of the cable systems involved, and a copy of such contract is filed, within 30 days after such contract is entered into, with the Copyright Office in the Library of Congress (which Office shall make each such contract avail-

able for public inspection); and

(B) the cable system to which the videotape is transferred complies with

paragraph (1) (A), (B) (i), (iii), and (iv), and (C) through (F); and (C) such system provides a copy of the affidavit required to be made in accordance with paragraph (1)(D) to each cable system making a

previous nonsimultaneous transmission of the same videotape.

(3) This subsection shall not be construed to supersede the exclusivity protection provisions of any existing agreement or any such agreement hereafter entered into, between a cable system and a television broadcast station in the area in which the cable system is located or a network with which such station is affiliated:

(4) As used in this subsection, the term "videotape", and each of its variant forms, means the reproduction of the images and sounds of a program or programs broadcast by a television broadcast station licensed by the Federal Communications Commission, regardless of the nature of the material objects,

such as tapes or motion pictures, in which the reproduction is embodied.

On page 17, line 19, strike out "(e)" and insert in lieu thereof "(f)".

On page 17, line 29, immediately after "or", insert a comma and the following: "in accordance with subsection (e),".

LAW OFFICES OF RICHARD L. BROWN, Washington, D.C., September 15, 1975.

Hon. Antonio B. Won Pat, Cannon House Office Building, House of Representatives, Washington. D.C.

DEAR MR. Won PAT: As you know, Lee Holmes is scheduled to testify on September 18, 1975, concerning HR 2223 and your bill HR 4965. In the last several weeks, there have been extensive discussions with the Motion Picture Association of America, concerning the "Stevens Amendment" and your bill.

Enclosed you will find an exchange of correspondence between Mr. Valenti of the Motion Picture Association and myself, on behalf of Guam Cable TV System, and letters simultaneously sent with this one to members of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee. The discussions between Guam Cable TV System and the MPAA have led to the drafting of proposed amendments to the "Stevens Amendment" currently in HR 2223. You will note, that these amendments are largely derived from your bill HR 4965. Lee Holmes is satisfied that passage of HR 2223 with the proposed amendments will be of great benefit to the many thousands of Guamanians who view CATV and the passage of the proposed amendments would alleviate the necessity of HR 4965. With these facts in mind, Guam Cable TV System respectfully urges that there is no need for passage of both HR 4965 and HR 2223, if amended as proposed. We hope that you would agree with this conclusion and would so inform the delegations of other offshore areas and also Mr. Kastenmeier, Chairman of the Committee on Courts, Civil Liberties and the Administration of Justice.

Lee Holmes will arrive in Washington on September 16, 1975, and will call upon you when he arrives.

With warmest regards,

RICHARD L. BROWN.

[Subsequent to the hearing the following statement and letter were received:]

STATEMENT BY HON. SPARK M. MATSUNAGA, MEMBER OF CONGRESS FROM HAWAII

Mr. Chairman, and members of the Subcommittee, I appreciate this opportunity to share with you my views on H.R. 9301, amendments to the Copyright Law, title 17 of the U.S. Code, which would allow cable antenna television (CATV) operators in non-contiguous areas of the United States to carry a full complement of videotaped programs for their paid subscribers, without incurring copyright liability.

The proposed legislation sets forth the operating procedures for CATV systems in non-contiguous areas regarding the transmission of nonsimultaneous, videotaped programs. It effectuates the ruling of the U.S. Supreme Court that CATV systems in the 48 states are not subject to copyright infringement for intercepting broadcast transmissions and rechanneling these programs simultaneously to their paid subscribers. The Court has determined that CATV systems are not "performers" of copyrighted programs, but act as adjuncts to regular broadcasting stations by extending the range of viewability. Consequently cable systems in the contiguous 48 states are not required to pay copyrigh royalties.

The Court, however, did not contemplate the unique position of CATV systems in non-contiguous areas. These cable systems generally transmit nonsimultaneous videotaped programs because they are much too far away from the mainland to receive over-the-air signals. Recently, the CATV systems in Guam and Alaska have been involved in lawsuits with mainland network producers and other copyright holders who allege that imported videotaped programs constitute copylight infringement under the Copyright Act of 1909. Most of these lawsuits have been settled out of court but my bill would eliminate the expensive and protracted threat of future litigation.

Hawaii maintains an unusual position within this matrix. Unlike Guam, which has only one broadcasting station, Hawaii has five regular stations and eight district CATV systems. Its CATV systems usually receive signals from the regular stations which carry the three major networks, and thus have a lesser requirement for videotaped programs of their own. In August 1971,

the Federal Communications Commission also allowed Hawaii CATV systems to import two distant signals. If Hawaii does elect to import the two extra signals, its CATV systems may be vulnerable to a charge of copyright infringement. In effect, this bill would ensure the future growth of the cable television industry because most operators would be able to expand their services without fear or threat of lawsuits.

I would like to emphasize here that H.R. 9301 would neither compromise nor displace the Copyright Revision Bill, H.R. 2223, now under consideration in this Subcommittee. It is an interim measure to equalize the legal postures of CATV systems in contiguous and non-contiguous areas. Until a copyright bill passes which deals with technological advancements in television and radio broadcasting, this proposal would ensure that CATV systems in non-contiguous areas are not liable for royalties to copyright holders for secondary transmissions.

I believe that it is essential that the inequities be corrected. It is obvious that

CATV systems in noncontiguous areas provide exactly the same service as do their counterparts within the 48 contiguous states, except that the means of obtaining all or some of the programs are different. Under the present law, isolated CATV systems are penalized for accidents in geography. Furthermore, contrary to unfounded reports, this bill would not prevent copyright holders from deriving just compensation for their works from cable television owners. In fact, the Supreme Court has declared that the broadcasting networks themselves may include cable television audiences when computing copyright programing fees. This bill would eliminate the need for a multitude of negotiations between cable television systems and copyright owners.

It is a sad fact that the Copyright Act of 1909, which is presently in effect, was drafted before broadcast television and cable television had even been conceived. Even the courts, on numerous occasions, have recognized the inapplicability of the statute to rapid technological developments and called for legislative reform. An omnibus copyright revision bili will definitely be needed to fortify the dam. But until that massive job is finished, I believe that this bill

would plug particularly one inequitable leak.

Thank you.

CBS INC., Washington, D.C., September 19, 1975.

Re H.R. 2223.

Hon. Robert W. Kastenmeier, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This morning Mr. Jack Valenti, President of the Motion Picture Association of America testified before you with respect to that part of Section 111 of H.R. 2223 which would permit cable systems to tape television programs in the continental United States and exhibit them to cable subscribers in offshore United States possessions. Mr. Valenti disclosed that his Association had concluded discussions concerning CATV operations in Guam and the Trust Territory of the Pacific with the Guam Cable TV System and had agreed with the Guam Cable TV System on language modifying the provisions of Section 111. The modifications agreed upon also make unnecessary H.R. 4965 introduced by Mr. Won Pat. I understand that Richard L. Brown, on behalf of the Guam Cable TV System, has confirmed to you and to Mr. Won Pat his satisfaction with the agreement worked out by the Motion Picture Association.

The purpose of this letter is merely to convey to you, on behalf of CBS, its approval of the modified language in Section 111 of H.R. 2223. We hope,

therefore, that the Subcommittee will adopt the recommended language.

With warm personal regards,

Sincerely.

RICHARD W. JENCKS, Vice President.

MOTION PICTURE ASSOCIATION OF AMERICA, INC., Washington, D.O., September 30, 1975.

Hon. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D. C.

MY DEAR MR. CHAIEMAN: A minor typographical error is contained in a paragraph designation in the modification to the so-called Stevens Amendment submitted to your Subcommittee. Two of the cross references in paras aph (2) (B) are incorrect.

For convenience, I am enclosing the complete text of the original proposed amendments with the corrections.

Sincerely.

JACK VALENTI, President.

Enclosure.

[Corrected copy]

PROPOSED AMENDMENTS TO H.R. 2223

On page 17, between lines 18 and 19, insert the following:

(e) Nonsimultaneous Secondary Transmissions By Cable Systems .-

(1) Notwithstanding those provisions of the second paragraph of subsection (f) relating to nonsimultaneous secondary transmissions by a cable system, any such transmissions are actionable as an act of infringement under section 501, and are fully subject to the remedies provided by sections 502 through 506, unless:

(A) the program on the videotape is transmitted no more than one time to

the cable system's subscribers; and

(B) the copyrighted program, episode, or motion picture videotaped, including the commercials contained within such program, episode, or picture, is trans-

mitted without deletion or editing; and

(C) an owner or officer of the cable system (i) prevents the duplication of the videotape while in the possession of the system, (ii) prevents duplication while in the possession of the facility making the videotape for the system, (iii) takes adequate precautions to prevent duplication while the tape is being transported, and (iv) subject to paragraph (2), erases or destroys, or causes the erasure or destruction of, the videotape; and

(D) within 45 days after the end of each calendar quarter, an owner or officer of the cable system executes an affidavit attesting (i) to the steps and precautions taken to prevent duplication of the videotape, and (ii) subject to paragraph (2), to the erasure or destruction of all videotapes made or used

during such quarter; and

(E) such owner or officer places or causes each such affidavit, and affidavits received pursuant to paragraph (2)(C), to be placed in a file, open to public inspection, at such system's main office in the community where the transmission is made or in the nearest community where such system maintains an office;

(F) the nonsimultaneous transmission is one that the cable system would be authorized to transmit under the rules, regulations and authorizations of the Federal Communications Commission in effect at the time of the nonsimultaneous transmission if the transmission had been made simultaneously, except that this

clause shall not apply to inadvertent or accidental transmissions.

(2) If a cable system transfers to any person a videotape of a program nonsimultaneously transmitted by it, such transfer is actionable as an act of infringement under section 501. and is fully subject to the remedies provided by sections 502 through 506. except that any cable system in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands may transfer, pursuant to a written, nonprofit contract providing for the equitable sharing of the costs of such videotape and its transfer, a videotape nonsimultaneously transmitted by it in accordance with paragraph (1), to another cable system in Guam,

the Northern Mariana Islands, or the Trust Territory of the Pacific Islands, if:
(A) each such contract is available for public inspection in the offices of the cable systems involved, and a copy of such contract is filed, within 30 days after such contract is entered into, with the Copyright Office in the Library of Congress (which Office shall make each such contract available for public in-

spection); and

(B) the cable system to which the videotape is transferred complies with

paragraph (1)(A), (B), (C) (i), (iii) and (iv) and (D) through (F); and (C) such system provides a copy of the affidavit required to be made in accordance with paragraph (1)(D) to each cable system making a previous nonsimultaneous transmission of the same videotape.

(3) This subsection shall not be construed to supersede the exclusivity protection provisions of any existing agreement, or any such agreement hereafter entered into, between a cable system and a television broadcast station in the area in which the cable system is located, or a network with which such station is affiliated.

(4) As used in this subsection, the term "videotape", and each of its variant forms, means the reproduction of the images and sounds of a program or programs broadcast by a television broadcast station licensed by the Federal Communications Commission, regardless of the nature of the material objects, such as tapes or motion pictures, in which the reproduction is embodied.

On page 17, line 19, strike out "(e)" and insert in lieu thereof "(f)".

On page 17, line 29, immediately after "or", insert a comma and the following:
"in accordance with subsection (e),".

Mr. Kastenmeier. At this time, the Chair would like to call Mr. Edward Cooper, vice president, Motion Picture Association of America, accompanied by Lawrence Monaco, vice president.

TESTIMONY OF EDWARD COOPER, VICE PRESIDENT, MOTION PIC-TURE ASSOCIATION OF AMERICA, ACCOMPANIED BY LAWRENCE MONACO, VICE PRESIDENT

Mr. Cooper. Thank you, Mr. Chairman. I am Edward Cooper, vice president of the Motion Picture Association, and with me is Mr. Law-

rence Monaco our legislative counsel.

We are substituting for Mr. Valenti, the president of the association, who has testified here before. He is in California for a series of conferences of utmost importance to the motion picture industry. He has asked me personally to apologize for his inability to be here, and give his regret that he cannot testify in person. Before you is a copy of his statement, to which is attached a copy of proposed amendments to the bill, H.R. 2223, and a detailed explanation of those amendments. I will not-

Mr. Kastenmeier. Without objection, that statement-

Mr. Cooper. I was just about to ask that.

Mr. Kastenmeier [continuing]. And the proposed amendments will be inserted in the record.

[The prepared statement of Jack Valenti follows:]

STATEMENT OF JACK VALENTI, PRESIDENT OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., AND THE ASSOCIATION OF MOTION PICTURE AND TELEVISION PRO-DUCERS, INC., ON NONSIMULTANEOUS TRANSMISSIONS BY OFFSHORE CABLE SYSTEMS

My name is Jack Valenti. I am President of the Motion Picture Association of America, a trade association whose members are the major American producers and distributors of copyrighted motion pictures. We are, therefore, the principal

holders of the copyrighted program material seen on television and cable.

This statement also represents the view of and is filed in behalf of the Association of Motion Picture and Television Producers of Hollywood, California whose membership comprises some 70 companies, large and small, employing more than 60,000 persons, who produce copyrighted motion pictures for theatrical exhibition and television viewing, and television series programs. I am also privileged to speak for the Committee of Copyright Owners, an ad hoc committee of independent producers and distributors of filmed and taped copyrighted television programs. This committee was formed to coordinate its members' efforts in resolving copyright-cable television legislative problems and the regulatory issues that arise from time to time on the importation of television signals by cable systems.

I appreciate the opportunity to again testify on that part of Section 111 of H.R. 2223 and on H.R. 4965, the Won Pat Bill, both of which would permit cable systems to tape television programs in the continental United States and exhibit them

to cable subscribers in offshore United States possessions.

The Motion Picture Association, the Association of Motion Picture and Television Producers, and the Committee of Copyright Owners are all opposed to the provision in Section 111 in its present form and to the Won Pat Bill as I pointed

out in my statement to this Subcommittee on June 12, 1975.

At that time I explained that the proposal was first made in the Senate by Senator Stevens to meet a problem in Alaska and thus became known as the Stevens Amendment. It will be found on page 17, beginning on line 29 of the Bill. The Alaska problem was solved some months ago and no longer exists. As originally drafted, and as now incorporated in H.R. 2223, the so-called Stevens Amendment, and the Won Pat Bill, seek to re-define a "secondary transmission" by asserting that a non-simultaneous transmission shall L deemed to be a simultaneous transmission for certain offshore purposes.

However, throughout congressional consideration of the copyright bill, it has been my policy to attempt to conciliate differences, particularly when special circumstances are involved. That is why, when Mr. Lee Holmes, owner of the Guam Cable TV System and his counsel, Richard Brown, asked me to discuss the Stevens

Amendment, I was pleased to do so.

My conferences with Mr. Holmes and Mr. Brown convinced me that as a matter of public interest the people who live on Guam deserved special consideration. Guam is more than 5,000 miles from the Western shore of the continental United States. It has only one commercial television station that operates for a limited number of hours daily. It is apparent that the people of Guam would be denied a fair share of television programming if the cable system was unable to tape programs on the mainland and fly them in.

Moleover, Mr. Holmes spoke of his intention to install and operate systems on the Islands of Tinian and Saipan where the United States Government is expected to create major military installations with large numbers of American service families. Mr. Holmes or other operators of those systems or systems elsewhere in the Marianas and the Trust Territory of the Pacific Islands would be

able to use the program tapes supplied to Guam.

It seemed to me, therefore, that in the public interest we should make every effort to work out language acceptable to the parties and which we could recommend to this Subcommittee for its favorable consideration. The copyright owners and the Guam cable system have now reached agreement on such language. It modifies the provisions of Section 111 and makes the Won Pat bill unnecessary.

The modifying language we are recommending to the Subcommittee would permit cable systems in offshore areas covered by the so-called Stevens Amendment to tape television programs and show those taped programs to their cable subscribers without infringing any copyright, if the cable system satisfies the

requirements stated in the modifying language.

As the Chairman and the Members of the Subcommittee are aware, letters affirming the agreement between the copyright holders and the Guam system have been sent the Committee by Mr. Brown in behalf of Mr. Holmes, and by myself in behalf of the two Associations and the Committee of Copyright Owners. Mr. Brown additionally has written the Delegate from Guam pointing out that his bill is no longer necessary. May I request, Mr. Chairman, that the letters be included in the record of these hearings.

We believe the proposal is in the public interest because it mal. 'allowance for the special circumstances that affect United States offshore areas covered by the so-called Stevens Amendment now in H.R. 2223. For these reasons, we respectfully request that the Subcommittee adopt the recommended language.

I am attaching at the end of my statement the text of the proposed Amend-

ments and a detailed explanation of them.

PROPOSED AMENDMENTS TO H.R. 2223

'On page 17, between lines 18 and 19, insert the following:

(e) Nonsimultaneous Secondary Transmissions By Cable Systems.—

(1) Notwithstanding those provisions of the second paragraph of subsection (f) relating to nonsimultaneous secondary transmissions by a cable system, any such transmissions are actionable as an act of infringement under section 501, and are fully subject to the remedies provided by sections 502 through 506, unless:

(A) the problem on the videotape is transmitted no more than one time to the

cable system's subscribers; and

(B) the copyrighted program, episode, or motion picture videotaped, including the commercials contained within such program, episode, or picture, is transmitted without deletion or editing; and

(C) an owner or officer of the cable system (i) prevents the duplication of the videotape while in the possession of the system, (ii) prevents duplication while in the possession of the facility making the videotape for the system, (iii) takes adequate precautions to prevent duplication while the tape is being transported, and (iv) subject to paragraph (2), rases or destroys, or causes the erasure or destruction of, the videotape; and

(D) within 45 days after the end of each calendar quarter, an owner or officer of the cable system executes an affidavit attesting (i) to the steps and precautions taken to prevent duplication of the videotape, and (ii) subject to paragraph (2), to the erasure or destruction of all videotapes made or used during such quarter;

(E) such owner or officer places or causes such affidavit, and affidavits received pursuant to paragraph (2) (C), to be placed in a file, open to public inspection, at such system's main office in the community where the transmission is made or in

the nearest community where such system maintains an office; and

(F) the nonsimultaneous transmission is one that the cable system would be authorized to transmit under the rules, regulations and authorizations of the Federal Communications Commission in effect at the time of the nonsimultaneous transmission if the transmission had been made simultaneously, except that this

clause shall not apply to inadvertent or accidental transmissions.

(2) If a cable system transfers to any person a videotape of a program nonsimultaneously transmitted by it, such transfer is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, except that any cable system in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands may transfer, pursuant to a written, nonprofit contract providing for the equitable sharing of the costs of such videotape and its transfer, a videotape nonsimultaneously transmitted by it in accordance with paragraph (1), to another cable system in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands, if:

(A) each such contract is available for public inspection in the offices of the cable systems involved, and a copy of such contract is filed, within 30 days after such contract is entered into, with the Copyright Office in the Library of Congress (which Office shall make each such contract available for public inspection); and

(B) the cable system to which the videotape is transferred complies with para-

graph (1) (A), (B) (i), (iii) and (iv), and (C) through (F); and

(C) such system provides a copy of the affidavit required to be made in accordance with paragraph (1)(D) to each cable system making a previous nonsimulta-

neous transmission of the same videotape.

(3) This subsection shall not be construed to supersede the exclusivity protection provisions of any existing agreement, or any such agreement hereafter entered into, between a cable system and a television broadcas' station in the area in which the cable system is located, or a network with which such station

(4) As used in this subsection, the term "videotape", and each of its variant forms, means the reproduction of the images and sounds of a program or programs broadcast by a television broadcast station licensed by the Federal Communications Commission. regardless of the nature of the material objects, such

as tapes or motion pictures, in which the reproduction is embodied.

On page 17, line 19, strike out "(e)" and insert in lieu thereof "(f)".

On page 17, line 29, immediately after "or", insert a comma and the following: "in accordance with subsection (e),".

EXPLANATION OF PROPOSED MODIFYING LANGUAGE

The proposed modifying language would permit a cable system in offshore areas covered by the Stevens Amendment to tape television programs and show the programs to its subscribers, without infringing any copyright, if the cable system satisfies all of the following requirements:

(1) The system shows the taped program only one time.

(2) The copyrighted program, whether it is a motion picture, television series, a documentary, or any other television program, must be taped and shown by the cable system without any deletion or editing, including no deletion of com-mercials with one exception: The system is authorized to delete commercials prior to the beginning of, and after the end of, the motion picture, documentary, or other program being taped.

(3) The cable system is required to prevent duplication of the tape while the tape is in the system's possession and while it is in the possession of the facility making the tape. The cable system must also take adequate precautions to see that there is no duplication during any time the tape is being transported from one place to another. After showing the tape one time, the system shall destroy or erase the tape, unless the tape is being transferred to another cable system in accordance with the proposed language.

(4) Every 3 months the cable system is required to execute an affidavit on the measures it has taken during the preceding 3-month period to prevent duplication. Each affidavit must be made available for public inspection by the cable

system.

(5) The cable system may tape and show its subscribers only those television programs which the system is permitted to show live under FCC rules (but cannot do so because of geographical distance). If, however, the system inadvertently or accidentally shows a program that it would not have been permitted to show live, no copyright infringement occurs.

A cable system is prohibited from transferring any of its videotapes to another cable system for showing to the other system's subscribers unless that other system is located in Guam, the Northern Marianas, or the Trust Territory of

the Pacific Islands, and unless certain additional requirements are met.

The first condition is that the transfer may be made only under a nonprofit contract providing for the equitable sharing of the costs of the tape among the authorized cable systems using the tape. These costs include the purchase price of the blank tape, the processing costs, and the transportation and handling costs in transferring the tape from the taping facility o the first cable system and thereafter to each system. The contract must be filed in the office of each cable system and with the Copyright Office in the Library of Congress. Each system to which the videotape is transferred must comply with the same requirements that bind the cable system which originally showed the tape. However, the subsequent system users are not covered by the prohibition against the duplication at the taping facility. In addition, each cable system must furnish a copy of its affidavit to every cable system which previously had shown the same tape.

The last provision of the proposed, modifying language makes clear that any existing or future contract between a cable system and a television station or network that provides for exclusivity or nonduplication protection may not be superseded by the amendment. For example, assume cable system X tapes the programs of a Los Angeles television station and shows them in Guam. The Guam television station shows many of the same programs that the Los Angeles station does. The Guam television station and cable system sign a contract that provides that the cable system will not show the Los Angeles-taped programs for a specified period of time immediately following the howing in Los Angeles. If the Guam television station has not shown the program after the end of the period, the Guam Cable System may then show the program unless the Federal Communications Commission has adopted a contrary rule.

Mr. Cooper. Thank you. I will not take the time to read Mr. Valenti's statement, because I think your time is precious. We don't really need it. I hope the committee will have an opportunity to read Mr. Valenti's statement

The members of the committee have received the letters the chairman just referred to from both Mr. Valenti and Mr. Holmes, explaining that an agreement had been worked out on legislative changes in the bill between the copyright holders and Mr. Holmes on behalf of the cable system. That agreement is embraced in the proposal that has been submitted to the committee. As the committee knows and as Mr. Valenti testified here last June, he made clear the sharp concern of copyright holders with the language in the bill, 2223, on page 17, beginning line 29, which has commonly been referred to as the "Stevens amendment" because it came over from the Senate bill. That provision would have permitted cable systems to tape television programs in the continental United States and exhibit them to subscribers in offshore possessions of the United States. Our concern, then, was that this pro-

vision failed to take into consideration the lawful rights and interests of copyrighted owners in their copyrighted copies. It did so by redefining a secondary transmission, so that what was actually not a nonsimultaneous transmission could be held to be a simultaneous transmission in these offshore areas.

We were further disturbed because the provision lent itself to the misuse of taped material through piracy of the programs. Piracy of films currently costs our industry many millions of dollars annually.

The Won Pat bills, H.R. 4965 and 9301, have the same deficiency by permitting widespread taking, but they closed, fortunately, some of the piracy loopholes, a proposal which we strongly endorse, and which has been incorporated into the amendments we respectfully

propose to the committee.

Moreover, there was another factor. Guam presented an unusual situation because of its distant geographical lication, coupled with the inability Mr. Holmes referred to of the cable system to obtain adequate local programing. As Mr. Valenti noted in his statement before you, and as Mr. Holmes has pointed out, a series of meetings was held with Mr. Holmes and his counsel and a good faith effort was made to seek a legislative compromise that would meet the current situation in Guam and in the adjacent islands and in the Pacific Trust Territories.

In short, the Won Pat bills formed the basis for those provisions in the agreement that protect the integrity of the tapes in a manner satis-

factory to the copyright holders.

On our part, we have made special concessions on the use and the handling of tapes for Guam and the far Pacific. We respectfully ask the committee's favorable consideration of what the parties have agreed upon. But clearly, we think that what has been agreed upon is greatly in the public interest.

I thank you

Mr. Kasten. Age. Thank you very much, Mr. Cooper, for presenting Mr. Valenti's statement to us and a restatement of his position and that of your association. Needless to say, when a matter can be reconciled, such as in this case, the committee is very happy indeed.

The committee will, of course, examine it, because we do not need to be reminded that we represent more than merely two parties to a potential dispute, but I would assume that what you have agreed to can be accepted as being in the public interest?

Mr. Cooper. We certainly believe so, Mr. Chairman.

Mr. Kastenmeier. I would like to yield to the gentleman from Illinois.

Mr. Raisback. I want to thank you for your testimony this morning, and also just say that I want personally to welcome the Holmes, whom I met while visiting Guam. I was with the Eilberg subcommittee and we received tremendous hospitality from the Governor and all of the Guamanians and also we had a chance to visit the northern Marianas. I was very impressed with the desire of those people to become American citizens. So, we are happy to hear you and we are glad you worked out an agreement.

Mr. Holmes. Thank you very much, sir.

Mr. Drinan. I take it, from what I heard, that nonsimultaneous recording in noncontingent use areas is a nonproblem?

Mr. Cooper. That is well put.

Mr. Drinan. I am just delighted and I congratulate you. I yield back my time.

Mr. Kasten: ER. The gentleman from New York.

Mr. Pattison. No questions.

Mr. Kastenmeier. If there are no further questions, then, we appreciate the appearance of Mr. Cooper and Mr. Holmes and their

S tilement of the issue between the parties is reflected in the

for wing correspondence:

(1) Letter from Jack Valenti, president, Motion Picture Association, to the Chair, dated November 7, 1975, and enclosure, and (2) letter from Senator Ted Stevens of Alaska to the Chair, dated November 10, 1975.

> MOTION PICTURE ASSOCIATION OF AMERICA, INC., Washington, D.C. November 7, 1975.

Hon. Robert W. Kastenmeier,

Chairman, House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Washington, D.C.

My Dear Mr. Chairman: You will recall that under date of October 8, 1975 Senator Stevens wrote you with respect to the agreement on the taping of programs for nonsimultaneous transmission by cable systems in offshore areas as jointly agreed to by Mr. Lee Holmes in behalf of the Guam cable system and myself in behalf of the copyright holders.

Senator Stevens praised the parties for their willingness to work out an agreement but suggested that consideration be given to further changes that would permit so-called "bicycling" of tapes within Alaska (as permitted between Guam and within the Pacific trust territories) and that the liability of

cable systems for piratical taping be modified.

This is to advise you that our staff people met with Senator Stevens' staff and with your committee counsel, Mr. Fuchs during which it was agreed to work out language to meet Senator Stevens' request. Subsequently, the Senator asked that we further modify a cable system's liability against duplication and we have done so.

Attached herewith is the complete text of the Stevens-Won Pat amendment as further modified at Senator Stevens' request. I assume that Senator Stevens will advise you of his approval of what has been done. I hope that this additional compromise will be satisfactory to you and your subcommittee.

Sincerely,

JACK VALENTI, President.

[Corrected copy]

Proposed Amendments to H.R. 2223

On page 17, between lines 18 and 19, insert the following:

 (e) Nonsimultaneous Secondary Transmissions By Cable Systems.—
 (1) Notwithstanding those provisions of the second paragraph of subsection (f) relating to nonsimultaneous secondary transmissions by a cable system, any such transmissions are actionable as an act of infringement under section 501, and are fully subject to the remedies provided by sections 502 through 506,

(A) the program on the videotape is transmitted no more than one time to the

cable system's subscribers; and

(B) the copyrighted program, episode, or motion picture videotaped, including the commercials contained within such program, episode, or picture, is trans-

mitted without deletion or editing; and

(C) an owner or officer of the cable system (i) prevents the duplication of the videotape while in the possession of the system, (ii) prevents unauthorized duplication while in the possession of the facility making the videotre for the system if the system one or controls the facility, or takes reasonable precautions to prevent such duplication if it does not own or control the facility, (iii) takes adequate precautions to prevent duplication while the tape is being transported, and (iv) subject to paragraph (2), erases or destroys, or causes the erasure or destruction of, the videotape; and

(D) within 45 days after the end of each calendar quarter, an owner or officer of the cable system executes an affidavit attesting (i) to the steps and precautions taken to prevent duplication of the videotape, and (ii) subject to paragraph (2), to the erasure or destruction of all videotapes made or used during

such quarter; and

(E) such owner or officer places or causes each such affidavit, and affidavits received pursuant to paragraph (2) (C), to be placed in a file, open to public inspection, at such system's main office in the community where the transmission is made or in the nearest community where such system maintains an office; and

(F) the nonsimultaneous transmission is one that the cable system would be authorized to transmit under the rules, regulations and authorizations of the Federal Communications Commission in effect at the time of the nonsimultaneous transmission if the transmission had been made simultaneously, except that this

clause shall not apply to inadvertent or accidental transmissions.

- (2) If a cable system transfers to any person a videotape of a program nonsimultaneously transmitted by it, such transfer is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, except that Lany cable system in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands may transfer, pursuant to a written, nonprofit contract providing for the equitable sharing of the costs of such videotape and its transfer, a videotape nonsimultaneously transmitted by it in accordance with paragraph (1), to another cable system in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands, may be transferred by one cable system in Alaska to another system in Alaska, by one cable system in Hawaii permitted to make such nonsimultaneous transmissions to another such cable system in Hawaii, or by one cable system in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands, to another cable system in any of those three territories, if:
- (A) each such contract is available for public inspection in the offices of the cable system involved, and a copy of such contract is filed, within 30 days after such contract is entered into, with the Copyright Office in the Library of Congress (which Office shall make each such contract available for public inspection); and
 (B) the cable system to which the videotape is transferred complies with

paragraph (1) (A), (B), (C) (i), (iii) and (iv) and (D) through (F); and

- (C) such system provides a copy of the affidavit required to be made in accordance with paragraph (1)(D) to each cable system making a previous nonsimultaneous transmission of the same videotape.
- (3) This subsection shall not be construed to supersede the exclusivity protection provisions of any existing agreement, or any such agreement hereafter entered into, between a cable system and a television broadcast station in the area in which the cable system is located, or a network with which such station is affiliated.
- (4) As used in this subsection, the term "videotape", and each of its variant forms, means the reproduction of the images and sounds of a program or programs broadcast by a television broadcast station license! by the Federal Communications Commission, regardless of the nature of the material objects, such as tapes or motion pictures, in which the reproduction is embodied.

One page 17, line 19, strike out "(e)" and insert in lieu thereof "(f)". On page 17, line 29, immediately after "or", insert a comma and the following: "in accordance with subsection (e),".

> U.S. SENATE, COMMITTEE ON COMMERCE. Washington, D.C., November 10, 1975.

Hon. Robert W. Kastenmeier, Chairman, House Subcommittee on Courts, Civil Liberties and the Administration of Justice, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to my October 8th letter to you concerning several problems I had with proposed amendments to Section 111 of the Omnibus copyright Bill, my office has had the benefit of several discussions with representatives of the Motion Picture Association in an attempt to reach agreement on these matters. I am pleased to report to you that such agreement has

now been reached.

As you will recall, these problems affected copyright matters pertaining to non-contiguous cable systems. At the behest of Mr. Fuchs, of your office, several discussions were held and agreement was reached on working for these proposed amendments which address the concerns of both the Motion Picture Association and the cable operators in Alaska. It is my understanding that you are in possession of a copy of the revised wording for these proposed amendments, contained in Mr. Valenti's November 7th letter to you concerning this matter.

I wish to thank you and your fellow members on the Subcommittee for your

interest and hard work on behalf of the Alaskan Cable system.

With best wishes, Cordially,

TED STEVENS, U.S. Senator.

Mr. Kastenmeier. Now, the committee would like to turn to the questions of ephemeral recording rights, involving music of a religious nature, as appears in Section 112(c). Our first witness on that subject this morning is Albert Ciancimino.

TESTIMONY OF ALBERT F. CIANCIMINO, COUNSEL, SESAC, INC., OF NEW YORK

Mr. CIANCIMINO. Well, I am not General SESAC, as on the witness list, but I thank you for allowing me to be here today.

Mr. Chairman, I would like to submit the complete text of my state-

ment to you.

Mr. Kastenmerer. Without objection, your statement in its entirety will be accepted and made a part of the record.

[The prepared statement of Albert Ciancimino follows:]

STATEMENT OF ALBERT F. CIANCIMINO, COUNSEL FOR SESAC, INC.

Mr. Chairman, members of the Committee, my name is Albert F. Ciancimino, and I am a member of the New York Bar and counsel to SESAC Inc. in New York. The main issue involving Section 112(c) of H.R. 2223 is relatively simple. It is whether or not a religious program producer can use a piece of religious music and distribute it to approximately 4,000 radio stations without any compensation to the creator of that religious music. Stripping away all of the other issues and side-issues, we basically come to the question—Is Congress going to provide that the creator of a religious copyright is to continue to have the right to receive payment for the mechanical reproduction of his work by a religious program producer, or for the first time in the history of the United States Copyright Act, is Congress going to say that in the area of mechanical reproduction rights, an outright exemption is going to be granted. You may remember, Mr. Chairman and members of the Committee, that even the Public Broadcasting Service representatives have not asked for an exemption in the mechanical rights area, but rather have asked for a statutorily governed fee to be set by Congress. The National Religious Broadcasters are going one step beyond the educators and public broadcasters by asking for this total exemption. It is our position that no such exemption is justified and it should not be granted.

In the Summer of 1973, I had the pleasure of appearing before a Senate Subcommittee on this very issue. At that time, as now, I testified since the 112(c) exemption is already in the proposed Copyright Revision Bill. Testimony given by the National Religious Broadcasters after my appearance, therefore, went unrebutted. I will now refer to and answer segments of the NRB's prior testimony

in order to set the record straight.

In 1973, the NRB made much of the fact of the three performing rights organizations (ASCAP, BMI and SESAC), only SESAC was asking religious program producers to sign licenses for recordings of religious music on their transcribed programs. It was implied that SESAC was overreaching and applying undue pres-

sure in an area where the other two organizations were not causing any problems. To quote from the NRB's 1973 testimony:

"Religious program producers have reported no problems in this respect with ASCAP or BMI. Only SESAC, according to frequent reports, has pressured cer-

tain of the religious program producers to make such payments."

The NRB failed to point out, however, that ASCAP and BMI cannot ask for mechanical licenses in this area because they do not represent the mechanical rights on behalf of their affiliates. Both ASCAP and BMI represent only the performance rights. SESAC alone of the three organizations represents not only the performance rights but also the mechanical and synchronization rights on behalf of its affiliates. I believe the NRB is well aware of this basic fact of life in our industry, and I am dismayed that such a fact has been so terribly distorted.

One thing should be made clear. We have no desire to inhibit the broadcasting of religiously oriented programs. To the contrary, we are simply trying to maintain the integrity of a religious copyright and we are simply trying to preserve to the creator of a religious copyright those rights which are now, and even under H.R. 2223, will continue to be available to the creator of non-religious copyrights. Why should one who creates a religious work be treated as a second class citizen? Clearly, even under the NRB's proposal as reflected in 112(c), this exemption is to be granted only with regard to religious works. If Oral Roberts or Billy Graham uses a non-religious work on his program, there is no question that he will be responsible for the payment of mechanical royalty fees. The creator of a religious copyright has the same expenses as the creator of a non-religious copyright. He must pay the same for a loaf of bread or a bottle of milk. Why then the distinction in allowing the author of a non-religious work a broader earning base than the creator of a religious copyright. Also, one can imagine the very substantial problems of determining what is a religious work. In many instances, whether a work is of a religious nature is determined on a subjective basis by each listener.

In 1973 the NRB also asserted: "Any law requiring or leaving open the possibility that mechanical reproduction fees be paid for such use could make this music too expensive in the average religious broadcast. . . ."

The fact of the matter is that the usual charge to a program producer for the use of a copyright in a transcribed program to be heard on radio is a rather nominal \$10.00 per year per copyright for unlimited use of that copyright during that year. I think that organizations such as Billy Graham's Hour of Decision, The Lutheran Hour, The Baptist Bour and others cited by the NRB in 1973 as NRB members can well afford to pay the creator of a religious song \$10.00 a year for unlimited use of that song. If they can afford this more than half-page ad in a Minneapolis newspaper earlier this month to attract viewers and listeners of the Word of God, they surely can pay those creating the music of God. The NRB in 1973 said over and over again that responsible religious broadcasting is a non-profit activity carried on as a ministry. We again emphasize that we have no quarrel with the importance of such a ministry and with the fact that the country needs no of this kind of broadcasting. All we ask is that these non-profit organizations (many of whom are rather large and wealthy) pay for the use of their religious music just as they pay for their newspaper advertisements, their electricity, their studio and auditorium rental, their executive salaries, their plane fares from city to city, their guest starts and every other expense normal to their business.

Again in 1973 the NRB stated and again today they state: "The proposed

mechanical reproduction exemption would cause no measurable injury to reli-

gious music copyright owners, their publishers or agents. . ."

What is left unsaid is that many of the program producers at the behest of NRB have refused to pay mechanical royalties pending resolution of this issue by Congress. However, if they recognize their current obligations under the 1909 law, as have some of their associates, a more substantial amount of income would be accruing to copyright proprietors today. Therefore, the injury to religious music copyright owners is both measurable and substantial, as evidenced by the list of endorsements appended to my testimony in 1973 from the foremost copyright proprietor organizations in the industry. Letters were submitted in agreement with SESAC's basic position from The Church Music Publishers Association tion, The National Music Publishers Association, The Music Publishers Association, BMI, ASCAP, The Harry Fox Agency, The American Guild of Authors and Composers and The National Gospel Music Publishers Association. Mr. Chairman,

should you wish copies of the full letters of endorsement which are already contained in the record of the Senate hearings held in 1973, I will be more than happy to supply them to you. These organizations represent substantially all of the responsible copyright proprietor interests in the United States today and all of them are opposed to the inclusion of Section 112(c) in the pending R vision Bill. I might also add that the American Bar Association passed a resolution in 1973 which opposes 112(c) in its entirety.

It is interesting to note that in the monthly newsletter of the NRB calle? "Hotline", the June 1975 issue referred to a petition filed with the FCC which the NRB claimed "clearly discriminates against sectarian groups" and the NRB pointed out that the religious orientation of an applicant should not be used as a basis for determining its eligibility for a commission license. SESAC wholly endorses this position and we further ask that the religious orientation of a copyright creator not be used as a basis for determining his eligibility to receive

copyright royalty payments.

Before concluding, I must touch upon the often used NRB argument that 112(c) would eliminate unfair double fees. The NRB points to the performance payment made by a radio station to SESAC, ASCAP and BMI, generally under a blanket licensing arrangement, as well as the payment of a mechanical royalty under the current law by the program producer. This is no different, Mr. Chairman, from a situation where a commercial record company, such as Columbia, Decca, RCA, etc. would pay the copyright proprietor a mechanical reproduction fee for each record pressed, while at the same time the broadcaster pays a performance fee for his performance of the recording over the air. There is no "double fee". There are simply different uses being made by different people, each of which justifiably calls for compensation to the copyright owner.

In conclusion, I ask this sub-committee to consider and weigh the practical necessities for such an exemption as exists in 112(c) against the far-reaching and negative effects which it will have not only on trade industry practice as currently exists, but on the unwarranted dilution of the rights originally granted to the copyright proprietors by Congress in 1909. Only by allowing the copyright proprietor of religious works equal rights and an equal opportunity to earn a living, will we continue to enjoy the kind of music which has contributed to and hopefully will continue to contribute to the moral fiber of our great country.

Thank you.

Mr. Ciancimino. I will try to omit certain portions of the statement in the interest of time. The main issue involving section 112(c) of H.R. 2223 is relatively simple. It is whether or not a religious program producer can use a piece of religious music and distribute it to approximately 4,000 radio stations without any compensation to the

creator of that religious music.

You may remember, Mr. Chairman and members of the committee, that even the Public Broadcasting Service representatives have not asked for an exemption in the mechanical rights area, but rather have asked for a statutorily governed fee to be set by Congress. The National Religious Broadcasters are going one step beyond the educators and public broadcasters by asking for this total exemption. It is our position that no such exemption is justified and it should not be granted.

In the summer of 1973, I had the pleasure of appearing before a Senate subcommittee on this very issue. At that time, as now, I testified first since the 112(c) exemption is already in the proposed copyright revision bill. Testimony given by the National Religious Broadcasters after my appearance, therefore, went unrebutted. I will now refer to and answer segments of the NRB's prior testimony in order

to set the record straight.

By the way, I noted from reading the statement made by the NRB that all of the points I am addressing myself to are repeated in their testimony before you this morning.

In 1973, the NRB made much of the fact that of the three performing rights organizations—ASCAP, BMI, and SESAC—only SESAC was asking religious program producers to sign licenses for recordings of religious music on their transcribed programs. It was implied that SESAC was overreaching and applying undue pressure in an area where the other two organizations were not causing any problems. To quote from the NRB's 1973 testimony:

I might add, it is in their testimony today, too.

To quote from the NRB's 1973 testimony:

Religious program producers have reported no problems in this respect with ASCAP or BMI. Only SESAC, according to frequent reports, has pressured certain of the religious program producers to make such payments.

The NRB failed to point out, however, that ASCAP and BMI cannot ask for mechanical licenses in this area because they do not represent the mechanical rights on behalf of their affiliates. Both ASCAP and BMI represent only the performance rights. SESAC alone of the three organizations represents not only the performance rights but also the mechanical and synchronization rights on behalf of its affiliates. I believe the NRB is well aware of this basic fact of life in our industry, and I am dismayed that such a fact has been so terribly distorted.

One thing should be made clear. We have no desire to inhibit the broadcasting of religiously oriented programs. To the contrary, we are simply trying to maintain the integrity of a religious copyright and we are simply trying to preserve to the creator of a religious copyright those rights which are now, and even under H.R. 2223, will continue to be available to the creator of nonreligious copyrights.

Why should one who creates a religious work be treated as a second

class citizen?

The creator of a religious copyright has the same expenses as the creator of a nonreligious copyright. He must pay the same for a loaf of bread or a bottle of milk. Why then the distinction in allowing the author of a nonreligious work a broader earning base than the creator of a religious copyright? Also, one can imagine the very substantial problems of determining what is a religious work. In many instances, whether a work is of a religious nature is determined on a subjective basis by each listener.

In 1973 the NRB also asserted:

Any law requiring a leaving open the possibility that mechanical reproduction fees be onid for such use could make this music too expensive in the average religious broadcast.

The fact of the matter is that the usual charge to a program producer for the use of a copyright in a transcribed program to be heard on radio is a rather nominal \$10 per year copyright for unlimited use of that copyright during that year. I think that organizations such as Billy Graham's Hour of Decision, the Lutheran Hour, the Baptist Hour, and others cited by the NRB as NRB members in 1973 can well afford to pay the creator of a religious song \$10 a year for unlimited use of that song. If they can afford this more than the half-page ad in a Minneapolis newspaper earlier this month to attract viewers and listeners of the Word of God, they surely can pay those creating the music of God. The NRB in 1973 said over and over again that respon-

sible religious broadcasting is a nonprofit activity carried on as a ministry. We again emphasize that we have no quarrel with the importance of such a ministry and with the fact that the country needs more of this kind of broadcasting. All we ask is that these non-profit organizations—many of whom are rather large and wealthy—pay for the use of their religious music just as they pay for their newspaper advertisements, their electricity, their studio and auditorium rental, their executive salaries, their plane fares from city to city, their guests stars, and every other expense normal to their business.

Again in 1973 the NRB stated, and again today they state:

The proposed mechanical reproduction exemption would cause no measurable injury to religious music copyright owners, their publishers or agents * * *.

What is left unsaid is that many of the program producers at the behest of NRB have refused to pay mechanical royalties pending resolution of this issue by Congress. However, if they recognize their current obligations under the 1909 law, as have some of the associates, a more substantial amount of income would be accruing to copy-

right proprietors today.

Therefore, the injury to religious music copyright owners is both measurable and substantial, as evidenced by the list of endorsements appended to my testimony in 1973 from the foremost copyright proprietor organizations in the industry. Letters were submitted in agreement with SESAC's basic position from the Church Music Publishers Association, the National Music Publishers Association, the Music Publishers Association, BMI, ASCAP, the Harry Fox Agency, the American Guild of Authors and Composers, and the National Gospel Music Publishers Association.

Mr. Chairman, should you wish copies of the full letters of endorsement which are already contained in the record of the Senate hearings held in 1973, I will be more than happy to supply them to you. These organizations represent substantially all of the responsible copyright proprietor interests in the United States today and all of them are opposed to the inclusion of section 112(c) in the pending revision bill. I might also add that the American Bar Association passed a resolu-

tion in 1973 which opposes 112(c) in its entirety.

It is interesting to note that in the monthly newsletter of the NRB called Hotline, the June 1975 issue referred to a petition filed with the FCC which the NRB claimed "clearly discriminates against sectarian groups" and the NRB pointed out that the religious orientation of an applicant should not be used as a basis for determining its eligibility for a commission license. SESAC wholly endorses this position and we further ask that the religious orientation of a copyright creator not be used as a basis for determining his eligibility to receive copyright royalty payments.

In the interests of time, I will conclude, Mr. Chairman, by asking this subcommittee to consider and weigh the practical necessities for such an exemption as exists in 112(c) against the far reaching and negative effects which it will have not only on trade industry practice as currently exists, but on the unwarranted dilution of the rights originally granted to the copyright proprietors by Congress in 1909. Only by allowing the copyright proprietors of religious works equal rights and an equal opportunity to earn a living, will we continue to

enjoy the kind of music which has contributed to and hopefully will continue to contribute to the moral fiber of our great country.

Mr. Kastenmeier. Thank you for your testimony. If you will wait for the following witnesses to appear, we will invite you back.

for the following witnesses to appear, we will invite you back.

Now the Chair would like to call Mr. Thomas Zimmerman, first vice president, National Religious Broadcasters, Inc., accompanied by Dr. Ben L. Armstrong, executive secretary and John H. Midlen, counsel.

TESTIMONY OF THOMAS F. ZIMMERMAN, FIRST VICE PRESIDENT, NATIONAL RELIGIOUS BROADCASTERS, INC., ACCOMPANIED BY DR. BEN L. ARMSTRONG, EXECUTIVE SECRETARY, AND JOHN H. MIDLEN, COUNSEL

Dr. ZIMMERMAN. Yes, Mr. Chairman, I have to my left Dr. Armstrong, executive secretary of the National Religious Broadcasters, and to my right, Mr. John H. Midlen, counsel for the National Religious Broadcasters in the United States.

ious Broadcasters in the United States.

My name is Thomas F. Zimmerman. I am an ordained minister and general superintendent of Assemblies of God, which has nearly 9,000 churches in the United States. We operate a sizable publishing house, which has a significant sacred department. We also produce religious programs for presentation on radio and television. I present this testimony as first vice president of National Religious Broadcasters,

concerning section 112(c) of H.R. 2223.

National Religious Broadcasters has approximately 650 members, distributed among the 50 States and territories. The membership consists primarily of broadcast station licensees and their associates, performing artists and other related persons in broadcasting, and religious program producers for broadcast stations. We estimate that there are 600 organizations, including those who are not NRB members, that produce religious programs on a nonprofit basis for a presentation on a number of broadcast stations. And there are many pastors, priests, and rabbis having their individual programs on local broadcast outlets.

Well-known religious programs utilizing religious music and which are vitally concerned that there be enacted the present provisions of section 112(c) of H.R. 2223, include Billy Graham's Hour of Decision, Eternal Light, Jewish Community Hour, The Hour of St. Francis, Sacred Heart Hour, The Lutheran Hour, Back to the Bible, Revival Time, and many others. Generally, these well-known programs are produced either on tapes or disk for distribution by mail of one copy only to each broadcast station carrying the program. The programs then are broadcast at the time and date agreed upon between the station and program producer. None of these programs is produced for a profit by the religious program producers. Instead, the religious program or furnishes the religious program without charge to the station.

The broadcast stations customarily have performance rights licenses covering the religious music with ASCAP, BMI, and SESAC Thus, religious music copyright owners do receive compensation for religious music broadcasts. NRB supports the rights of the copyright owners

to compensation for performances of religious music under these performance rights licenses, with the broadcast outlets. NRB also supports the rights of the copyright owners to compensation for mechan-

ical reproductions of religious music for sale or other profit.

Presently, there is confusion and contradiction with respect to claims for mechanical reproduction fees for musical works of a religious nature included in religious programs produced by nonprofit organizations for broadcasting purposes. Only SESAC, to our knowledge, has pressured for such payments. We have no reports of any problems in respect to either ASCAP or BMI, and presumably they could ar-

range to handle mechanical rights.

We know of no court decision directly on the point. Any law requiring or leaving open the possibility that mechanical reproduction fees be paid for such use could make this music too expensive in the average religious broadcast, since the financial resources of these nonprofit program producers are not adequate to accommodate such costs, according to two NRB studies. These studies were in 1973 and 1975, and were among NRB members that reflected that the affect to the potential of unlimited mechanical reproduction fees predominately ranged from (1) using only religious music in the public domain; (2) substantial curtailment of the number of broadcast outlets used or (3) even total discontinuance of the religious program.

Responsible religious broadcasting is a nonprofit activity, constituting a ministry no less viable than the worship services of the synagogue

or church.

Essentially, the taping or recording of programs not for profit and for single release or on occasions, a repeat release, simply is a method of producing such programs for convenience. To present the program live, utilizing telephone lines to individual broadcast stations would undeniably exempt from any claim for mechanical reproduction fees. But this procedure is not feasible, because of prohibitive costs and impracticability of using telephone lines.

Copyright owners receive a valuable service from religious program producers by the use of their music, thus gaining a broad exposure through radio and television presentation. Section 112(c) is not an industry innovation, but simply codifies a generally existing situation. There is not now any established right for mechanical reproduction fees for reproduction within the purpose of sale or compensation.

Nor can these religious music copyright owners really complain that the proposed section 112(c) in the copyright bill deprives them fany existing income. Only a small handful of religious program producers, to the best of our knowledge, succumb to SESAC's pressures for payment for mechanical reproductions in nonprofit, religious programs for broadcasting, and some of these having since terminated such payments. In short, there can be no claims for loss of income that they never really had.

Copyright legislation has rightly sought to protect copyright holders from mechanical reproduction of their literary property by those who do so for a profit, whether large or small. Religious program producers, however, clearly are not doing so for a profit, but for the

purpose of using religious music for religious inspiration.

Copyright owners can make no claim that the recordings are offered for sale, since the tapes or disks for religious broadcasts are not sold.

It is the reverse situation where the program producer pays the broadcast station to carry the program, or furnishing it without charge.

When a recorded program is broadcast, the tape is returned or the

When a recorded program is broadcast, the tape is returned or the disk destroyed. The tape is then erased so that it may be utilized for

subsequent broadcasts.

The present copyright exemption language of paragraph 112(c) is carefully designed to cover only mechanical reproductions with limitations for nonprofit religious programs. The responsible religious programers meet these criteria and their position clearly justifies the proposed exemption.

At the 33d Annual Convention of the National Association of Evangelicals, April 10, 1975, which numbers among its membership me at than 39,000 churches of various denominations in the United States, they adopted a resolution supporting the provisions in section 112(c) of H.R. 2223. This resolution is attached to my written statement.

The proposed provisions of section 112(c) of H.R. 2223 are nonsectarian and beneficial to Protestants, Catholics, and Jewish nonprofit religious program producers. We strongly urge the enactment in its present form of section 112(c) so that there will be encouraged the needed religious programing for the moral tone and well-being of our Nation.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Zimmerman. For the record, the resolution of the National Association of Evangelicals will be made a part of the record——

Mr. MIDLEN. The full text of the written statement of the National Religious Broadcasters, I ask be included too, Mr. Chairman.

Mr. Kastenmeier. Yes, you are talking about the full text?

Mr. Midlen. Yes, the full text, the written testimony.

[The propared statement of Dr. Thomas F. Zimmerman follows:]

STATEMENT OF REV. DR. THOMAS F. ZIMMERMAN FOR NATIONAL RELIGIOUS BROADCASTERS

INTRODUCTION

My name is Thomas F. Zimmerman. I am an ordained minister, and General Superintendent of Assemblies of God which has nearly 9,000 churches, a sacred music publishing company, and produces religious programs for presentation on radio and television stations. I present this testimony as First Vice President of National Religious Broadcasters concerning Section 112(c) of H.R. 2223.

National Religious Broadcasters (NRB) is a non-profit association formed in 1944 in order to contribute to the improvement of religious broadcasts, better serve the public interest, and more effectively minister to the spiritual welfare of this nation. The association has approximately 650 member organizations distributed among the 50 states of the United States, the District of Columbia, Puerto Rico, and Guam. The membership of National Religious Broadcasters consists of (1) broadcast station licensees and their associates, (2) performing artists and others related to broadcasting, and (3) those producing religious programs for broadcast stations. It is estimated there are more than 600 organizations, including those who are not NRB members, that produce religious programs on a non-profit basis for presentation on a number of broadcast stations. Additionally, it is conservatively estimated there are more than 1500 pastors, priests and rabbis having individual programs on local broadcast outlets.

Among the more widely known religious programs produced by NRB members for broadcasting are Billy Graham's Hour of Decision, The Lutheran Hour, The Baptist Hour, Methodist Hour, Back to the Bible (daily), Light and Tife Hour (Free Methodist), Revivaltime (Assemblies of God), Words of Houre (Reformed

Church in America), Vespers (American Lutheran Church), Morning Chapel Hour (daily), Herald of Truth, and many, many others. Other religious programs utilizing religious music and having extensive broadcast dissemination include the Hour of St. Francis, Ave Maria Hour, Sacred Heart Hour, The Protestant Hour, Voice of Prophecy (Seventh Day Adventist), Lamp Unto My Feet (ecumenical), Jewish Dimension, The Eternal Light, and Jewish Community Hour.

These and practically all religious program producers are vitally concerned that there be enacted the present provisions of Section 112(c) of the pending H.R. 2223 for general revision of the Copyright Law clarifying the right of non-profit organizations under certain circumstances to make for distribution to licensed transmitting organizations phonorecordings of religious music for usage in religious programs.

GENERAL DESCRIPTION OF RELIGIOUS PROGRAMS

The religious music used in religious programs creates an appropriate devotional mood as well as serves as a musical bridge between the spoken words with the degree of usage of religious music varying from program to program. The format for the various religious programs differs, of course, in degree, but the production and distribution principles are relatively uniform. The programs are produced either on tape or disc for distribution by mail of one copy only to each broadcast station carrying the program. The programs then are broadcast at the time and day agreed upon between the station and the program producer. None of these programs is produced for profit by the religious program producers. In fact, the religious program producer usually pays the broadcast station to carry the program or furnishes the religious program without charge to the broadcast outlet. The broadcast stations customarily have performance rights licenses covering this religious music with ASCAP, BMI, and SESAC. NRB supports the rights of the copyright owners to compensation for performances of religious music under these performance rights licenses with the broadcast outlets. NRB also supports the rights of the copyright owners to compensation for mechanical reproductions of religious music made for sale or other profit.

THE NEED FOR THE MECHANICAL REPRODUCTION EXEMPTION FOR BELIGIOUS PROGRAMS

There presently exists confusion and contradiction with respect to claims for mechanical reproduction fees for musical works of a religious nature included in religious programs produced by non-profit organizations for broadcasting purposes. Religious program producers have reported no problems in this respect with ASCAP or BMI. Only SESAC, according to frequent reports, has pressured certain of the religious program producers to make such payments. We know of no court decision directly on the point.

Primarily sacred music is written and published for the purpose of spiritual ministry and religious inspiration. It is incorporated into religious broadcasts

wholly apart from any intention or possibility of financial gain.

Any law requiring or leaving open the possibility that mechanical reproduction fees be paid for such use could make this music too expensive in the average religious broadcast since the financial resources of these program producers are not adequate to accommodate such cost as documented by NRB studies. In these studies, National Religious Broadcasters conducted Questionnaire Surveys among its membership in the Spring of 1973 and in the summer of 1975. The effect of the potential of unlimited mechanical reproduction fees among these responding organizations preponderantly ranged from (1) using only religious music in the public domain with such disadvantage for the listening or viewing audience to (2) substantial curtailment of the number of broadcast outlets used or (3) even total discontinuance of the religious program. Such a result would be a loss to all concerned, the composer, publisher, broadcaster, and most importantly the listening American public—since it could place a substantial part of modern religious music financially out of reach so far as religious broadcasting through use of mechanical reproduction means is concerned.

JUSTIFICATION FOR THE PROPOSED EXEMPTION

Responsible religious broadcasting is a non-profit activity, carried on as a ministry no less viable than the worship services of a church or a synagogue. Essentially the taping or recording of programs not for profit and for a single

release (or on occasions a repeat release) is simply a means of producing such programs for convenience. It obviates the necessity of releasing the program "live" utilizing the more expensive and totally impractical method of telephone lines from the program producer to the individual brogram stations, a procedure which would be undeniably exempt from any claim for mechanical reproduction fees.

It is common knowledge that religious program poducers render a valuable service to copyright owners by the very use of their music for such music is given exceedingly broad exposure through radio and television presentations. Many, if not most, programs featuring religious music have accompanying ready-made information sheets for the purpose of acquainting listeners requesting details concerning such music including the author, composer, publisher, and possible location where the music as records or sheet music may be purchased. These informational sheets are of great assistance because of the high incidence of requests for the data to the clear advantage of the copyright owner. In sum, religious program producers serve to promote religious music to the benefit of the copyright owners of such music.

The proposed mechanical reproduction exemption would cause no measurable injury to religious music copyright owners, their publishers or agents as it simply codifies a generally existing situation. The creators of religious music derive their income primarily from publishing and selling hymnals, gospel songbooks, sheet music, and records. This is supplemented by income from performing and synchronization rights licenses.

Moreover, only a small percentage of the repertoire of religious music is everbroadcast. There is a tendency to emphasize the music that is or has been popular so that a majority of the songs in hymnals, gospel songbooks, and sheet music are

never presented in religious programs on radio or television stations.

Nor can these religious music copyright owners really complain that the proposed Section 112(c) in the Copyright Bill deprives them of existing income. To the best of our knowledge only a small handful of religious program producers succumbed to SESAC's pressures for payment for mechanical reproductions in non-profit religious programs for broadcasting, and some of those have since terminated such payments. In short, the religious music copyright owners and their associates, who have been financially successful without mechanical reproduction income from non-profit religious programs, can make no claim for loss of income that they never really had.

In addition, mechanical reproduction fees for religious music in programs produced by non-profit organizations for broadcast stations could present substantial practical problems. Much of the music is not listed in catalogues of copyright owners so that there would be added the burden of seeking to ascertain to whom

any such payments would be made.

Copyright legislation has rightly sought to protect copyright holders from mechanical reproduction of their literary property by those who do so for profit—whether large or small. Religious program producers, however, clearly are not doing so for profit, but for the purpose of using religious music for religious

inspiration.

That the use made of religious music in a conventional religious broadcast is not for profit is demonstrated by the fact that when the recorded program has been broadcast, the tape is returned (or the disc destroyed) to the program producer. Its contents then are erased so that the tape may be utilized for subsequent broadcasts. Copyright owners can make no claim that the recordings are offered for sale since the tapes for religious broadcasts are not sold. In fact, the reverse takes place with the program producer paying the broadcast station to

carry the program, or furnishing it without charge.

The present copyright exemption language of Paragraph 112(c) is carefully designed to cover only mechanical reproductions with limitations for non-profit religious programming. The program producer must be (1) a non-profit organization (or governmental body), (2) only one copy of the program can be distributed to the broadcast or transmitting outlet, (3) the musical work is of a religious nature, (4) the program producer receives no direct or indirect compensation for making or distributing such tape or recording, (5) there is only a single transmission (or in some instances a repeat transmission) to the public by the broadcast station or other transmitting organization having a license therefor, and (6) except for one copy reserved for archival purposes the tapes or records are destroyed within a year from the date of the public transmission. The responsible religious programmers meet these criteria, and their position clearly justifies the proposed exemption.

SUPPORTING RESOLUTION OF NATIONAL ASSOCIATION OF EVANGELICALS

A major church body, the National Association of Evangelicals—which numbers among its membership more than 39,000 churches of various denominations in the United States—on April 10, 1975 at its Thirty-Third Annual Convention adopted a Resolution supporting the provisions in Section 112(c) of H.R. 2223 and S. 22 relating to religious broadcasting by non-profit organizations and urging that H.R. 2223 and S. 22 be so enacted. This Resolution of the National Association of Evangelicals is attached to this Statement.

CONCLUSION

The proposed provisions of Section 112(c) will be equally beneficial to Protestant, Catholic and Jewish non-profit religious program producers. Recent public developments have demonstrated that more than ever before there is a need to improve the moral tone and well-being of our nation. Increased religious broadcasting for this purpose is a definite need, and we urge the enactment in its present form of Section 112(c) of H.R. 2223 so that there will be encouraged rather than decreased or eliminated the amount of religious programming for this purpose.

COPYRIGHT LAW AND RELIGIOUS BROADCASTING

Whereas, there was introduced in January, 1975 and are pending before the Senate of the United States a Bill (S. 22) and before the House of Representatives of the United States a Bill (H.R. 2223) for the general revision of the Copyright Law, and

Whereas, there is included in both Copyright Bills a provision (Section 112c) clarifying the right of non-profit organizations under certain circumstances to make for distribution to licensed transmitting organizations phonorecordings of religious music, and

Whereas, payment of copyright fees for mechanical recordings of religious music for transmission over broadcast outlets could impose financial demands that would seriously curtail or possibly eliminate in some instances the presentation of religious programming, and

Whereas, the National Association of Evangelicals on May 2, 1973 at the 31st Annual Convention at Portland, Oregon adopted a resolution supporting a similar

-provision in the then pending Copyright Bill, and

Whereas, the National Association of Evangelicals, which numbers among its membership more than 39,000 churches of various denominations in the United States, considers that the state of the nation and of the world requires increased rather than decreased religious broadcasting to improve the moral tone and well-being of the nation,

Now, therefore, the National Association of Evangelicals, at this 33rd Annual Convention at Los Angeles, California on April 10, 1975 does hereby reaffirm its support of the provision in Section 112(c) of the pending Copyright Bills in the Senate and House of Representatives of the United States relating to religious broadcasting by non-profit organizations and does hereby urge that such proposed legislation be so enacted.

Passed by the Annual Business Session on April 10, 1975.

NATIONAL ASSOCIATION OF EVANGELICALS, BILLY A. MELVIN, Executive Director.

Mr. Kastenmeier. Mr. Ciancimino, would you please come forward? Is the present state of the law that there is liability or that there is not liability? Let me ask you first, Mr. Ciancimino, and any other of the panel of the National Religious Broadcasters can also speak to the question.

Do you construe the present law to provide liability or not?

Mr. CIANCIMINO. Very definitely, it provides for liability. If I might read from section 1(e), which clearly grants to copyright proprietors the exclusive right to "make any form of record in which the thought of an author may be recorded and from which it may be

read or reproduced." This has been interpreted by courts to grant mechanical reproduction rights, as qualified by the compulsory license provisions, to grant it to an author in every area of mechanical reproduction. There is no for-profit limitation that has ever been imposed on the creator for the mechanical reproduction rights which he enjoys under the statute.

Mr. Kastenmeier. Then section 112(c) is a change from the present

law?

Mr. CIANCIMINO. Very definitely.

Mr. Midlen. I distinctly disagree, Mr. Chairman. All of the cases that we know about in this field relate to reproduction when reproduction is made for profit. And we have already said that we think that a copyright owner is entitled to payment when there is reproduction for profit. The law does not say anything on this point. And certainly the Congress, as we read the legislative history in this matter, did not consider or did not have in mind in any respect the fact that reproduction for nonprofit would entitle a copyright owner to any such compensation, nor do we know of any court case that holds such an entitlement, when reproduction is totally nonprofit.

Mr. Ciancimino. Mr. Chairman? Mr. Kastenmeier. Mr. Ciancimino.

Mr. Ciancimino. Need I simply remind the chairman and the members of the subcommittee that groups such as educators, and public broadcast service representatives on this very right, namely, the mechanical production right, have never quarreled with the existence of that right, but they have asked that the right be governed by the Mathias bill. This is the first time that I have heard anyone quarrel with the copyright statute as to the rights granted to an author for mechanical reproduction.

I would humbly disagree with my learned counsel, my opposing counsel, and suggest to him that the cases that he refers to are cases in the area of performance rights law, where the area of for profit is a key issue under the 1909 statute, but not the area of mechanical

rights.

Mr. Kastenmeter. May I ask, first of all, what music are we talking about? What music is represented, Mr. Ciancimino, by SESAC which is religious in character and which is or might be used by National

Religious Broadcasters?

Mr. CIANCIMINO. SESAC represents a broad spectrum of music. The type of music we represent in this particular area is music from very well-known and prominent publishing companies in the gospel and sacred area. Saintspiration is one and Lilinus is another one of the largest. And there are many, many companies of this type that we represent. We represent them, not only for the performance rights, but also for the mechanical and reproduction rights. We also appended to our teatimony before the Senate, letters of encorsement from many music publishers in the gospel and sacred field, as well as organized publisher organizations in the church and gospel area. So this is the extent to which we have an interest in the matter. We are not the only organizations that do have an interest, but somehow, perhaps by default, I have been chosen to be the spokesman for the industry on this particular issue.

Mr. Kastenmeier. Dr. Zimmerman, Mr. Ciancimino says on page 3 that "National Religious Broadcast members can well afford to pay the creator of a religious song \$10 a year for unlimited use of that

song." Is that not true?

Dr. ZIMMERMAN. Mr. Chairman, our surveys show that this would impose a very substantial imposition on a number of broadcasters. We made a very careful survey. The survey was secured on the basis of confidentiality so that we would get an accurate input from them. But our surveys show that, as I have indicated, that there would be the necessity on the part of many of the broadcasters to have to go to only use of music in the public domain or a substantial curtailment on the part of their broadcasts or, in a few cases, the discontinuance of their religious programs.

On the surface, it does not appear to be a sizable sum of money, but actually the \$10 per year per number is sort of an arbitrary figure, I suppose, that SESAC has determined. There is nothing to guar-

antee that that would not be altered.

And it is not an insignificant matter. I know personally of several broadcasters who have told me that to meet this additional obligation would, in fact, infringe upon them a very substantial problem.

Mr. Kastenmeier. Mr. Ciancimino, Dr. Armstrong—well, Mr. Midlen before, said there are some of his members who have submitted to the importionings of your organization and do make payments. What is the situation? Have you established the right to collect pursuant to any court tests or otherwise? Have you tested this matter in the courts or are you policing this if you think it is your

right?

Mr. CIANCIMINO. SESAC has never in the past had occasion to bring an action against anyone for the violation of this particular right. We feel that under the 1909 statute, under section 1(e), it is clear that we have it. We have established the right to collect for this use. It is not something that is an innovation within the last couple of months. The \$10 fee is also the fee that is charged by the Harry Fox organization for a similar type of use. It is an industrywide established fee. I suppose we could raise the fee if we could have the user agree to pay a higher fee, just as we can raise the fees in the areas of the performance rights. But we are dealing here with an industry and we don't take very lightly to simply subjectively raising a fee without some kind of an agreement on behalf of the licensees. We do have some of the program producers licensed and have had them licensed for many years. These are the people that are recognizing their responsibility under the 1909 act. A sizable number of them were lice used up until a couple of years ago when again, at the importuning of the NRB they decided not to be licensed any further, pending clarification of the issue.

The Kastenmeier. Mr. Ciancimino, Dr. Zimmerman also suggests that there is an organization—that his organization is a very large one and contains many hundreds of individual church groups, broadcast, et cetera. You have cited some of the better known ones. In the ad there you cited Billy Graham, or Ural Roberts. These individuals may be identified with organizations that have these economic resources, but many of them obviously do not, maybe even hundreds do not. They

are not so similarly situated as far as resources. Is there any way to

distinguish between these groups or organizations?

Mr. CIANCIMINO. Well, I think, Mr. Chairman, that if the industry recognized its responsibility in this area, and if there were some legitimate economic considerations to be taken into consideration by SESAC, that we could work out something for the smaller program producer to meet their economic needs. We do this in many instances with the broadcast industry where a station is economically in trouble and we work out some kind of assistance for him so we don't cause an undue economic burden on him. We don't want to have any user of this music go out of business. That is not why we are here.

Mr. Kastenmeier. Do you have any statute or language to recommend? Your sole recommendation is to strike section 112(c). I take

it you are not asking to amend it or modify it?

Mr. CIANCIMINO. That is correct. We have no specific license rate schedule to propose. Under the 1909 law, there was no need for such a rate schedule. There was an accepted industrywide rate structure which, in effect, governed the relationship between the parties.

Dr. ZIMMERMAN. Mr. Chairman, If I could be permitted to have just a word on the question submitted. I would be greatly distressed if those using the medium of tapes or disks for the purpose of releasing a religious broadcast, if that was going to be left to the discrimination of an organization like SESAC or any other licensing agency. It seems to me that would put us in an untenable position. We would be more or less at the mercy of what they determined in a certain case. And to me, that would be a very unacceptable approach to the situation.

The religious broadcasters are not asking for charity. We are asking for recognition of the fact that we are producing a nonprofit broadcast, merely using the convenience of tape or disk rather than long lines for the convenience and economic advantages of that particular procedure. It seems to me that the question is rather irreconcilable that if a telephone line was used, there would be no question. But just because we happen to use the medium of a tage, then that throws it into a whole new category. And frankly, it just seems like it

is not an equitable approach to the matter.

Mr. Ciancimino. Mr. Chairman, might I just comment on that for 1 second. I believe in the prepared statement of Dr. Zimmerman, the reason why they don't use a telephone line is because of the expense. I am wondering why they haven't asked the telephone company for an exemption from paying the telephone line fees. Why must the copyright creator always be the one to subsidize the various enterprises the users are undertaking? Why must the copyright owner always be the one who doesn't get paid. And everybody says they do you a favor by popularizing your work and having it performed and having it broadcast. Well, everybody is willing to have everybody else pay, but unfortunately, the copyright creator sometimes bears the burden of the subsidy.

Mr. Kastenmeier. That has been a recurrent thing. Mr. Ciancimino. It certainly has been, Mr. Chairman.

Mr. Kastenmeier. But I would ask Dr. Zimmerman not to comment on that, but assume a proposition that religious composers do

not make a great deal of money and that they ought to be rewarded, even modestly, for their work. Now, how is it they can survive without that? I assume very often they are not commercial successes. In fact, by the very nature of their music, they are religious rather than commercial in character. It would seem that they would largely have to depend on religious organizations to compensate them a sum.

Dr. ZIMMERMAN. Well, Mr. Chairman, we take the position that they really are paid, because the stations who air these programs are licensed for the performance rights and we use the stations and pay the stations. So, indirectly, we are, in fact, contributing toward the payment for that particular performance of that song. In a sense, it is almost like buying two tickets to the same ballgame, for the simple reason it is paid for the performance right and then, because we happen, by the convenience and the economics of it, to use a tape as a medium, we find ourselves paying a second time for the use of the same song.

Mr. Kastenmeier. Thank you, I apologize to my colleagues for

taking so long.

Mr. CIANCIMINO. Mr. Chairman, might I comment on that last statement, please?

Mr. Kastenmeier. Very briefly.

Mr. Cincimino. Very briefly, but I do not want to let it pass, if at all possible. This two-ticket argument has been used over and over again, not only by the NRB, but by many other people. Following their rationale, a phonograph record company such Columbia, Decca, RCA, they shouldn't pay mechanical reproduction fees either. Because their argument would be when the radio station plays it, there is a performance credit that is given and therefore the author is paid.

There is clearly a different use here. First of all, they refer to a second payment where they haven't even made a first payment yet. The ones who are making the second payment are the broadcasters and it is for a performance use, completely different and apart from the use they make when they incorporate a religious song in their program and distribute it to the broadcasters and in turn get contributions.

and what-not from it. Thank you.

Dr. ZIMMERMAN. Mr. Chairman, if I could only point out one difference, and I am not wanting to belabor the time, but the difference we see is that Decca or the other record is a record sold for profit. And we make a strong differential between a tape that has been made for a one-time use and is not for sale and not for profit and one that is used for profit. So, in that sense, we do not see the argument at all.

Mr. Kastenmeier. The gentleman from Massachusetts.

Mr. Drinan. Thank you, Mr. Chairman. I never expected we would have a theological argument on copyright. We have had everything else.

But, on the contention that if everything is made not for profit, it somehow washes it, well, I have difficulty, because the teacher who Xeroxes 30 copies of Robert Frost's poems for her little children in school is in violation of the law, although she doesn't profit at all.

I wonder if anybody can tell us how much money we are actually talking about, a ball park figure. Is it a few hundred or a few thousand

or what?

Mr. Ciancimino. Father Drinan, we have never had the privilege of finding out, because many of the groups have not, again at the behest of certain organized user groups, have not paid us. But I would hesitate to give you an educated guess. If you want one, I will submit maybe on an industrywide basis. I think if you hit \$5,000 to \$100,000 a year you are talking about a high amount.

Mr. Drinan. Would you tell me, sir, how this thing got in here? I must say, I am astonished to find 112(c) "Musical Work of a Religious

Nature." What pious Senator initiated this?

Mr. Ciancimino. Part of my testimony before the Senate did go into this rather dry legislative history of 112(c). It first appeared and I am now quoting from my testimony before the Senate—it says, "It first appeared in February 8, 1971. It appeared in an announcement from the Copyright Office relating to the introduction of S. 664 in the 92d Congress, and it describes the differences between that bill and the prior bill as 'technical amendments and a few minor additions of substantive detail."

Prior to that time, it has never been the subject matter of a hearing.

Mr. Drinan. But who was the author?

Mr. Ciancimino. I plead innocence on this. Mr. Drinan. Only God knows.

Mr. Ciancimino. Only by hearsay, I believe I could say it was either the Copyright Office or the counsel for the subcommittee of the Senate.

Mr. Drinan. And this somehow sailed through without controversy

in the Senate?

Mr. Ciancimino. That is correct. We had testimony on it in the Senate.

Mr. Drinan. Did anybody try to justify why, in their opinion, the

law should prefer religious over rock?

Mr. CIANCIMINO. That is what I have been trying to find out, Father Drinan. I have really been trying to find out the difference. I think theologically the higher goal is religion rather than rock, but monetarily. There is a little thing called the establishment clause that says we can't do that.

But, I would like to ask Dr. Zimmerman the question that keeps coming up to me, and I suppose it is the \$64 million question, but why must the copyright creator bear the burden. As much as anyone would want diffusion of the religious music and all, the bottom line is that

the copyright creator doesn't get a certain fee.

Dr. ZIMMERMAN. Mr. Drinan, the feeling that we have had in this matter is that the use of the number on a religious broadcast, a nonprofit broadcast, does accrue great benefit to the copyright holder in that it popularizes that number. And I can attest from my own experience that when we use a number on our own broadcast, without any offer for sale of the number, we have numerous requests coming in to buy copies of that particular number, which accrues directly to the benefit of the-

Mr. Drinan. Well, that is not quite a straight answer, is it? Because the law says that the gentleman who has a rock broadcast, he may benefit directly or indirectly by popularizing his song in Peoria, but he is also entitled to his fee. It may be that it will never become popular and the only thing that he will have to go back to is that fee he gets. So that is really not an answer.

You are claiming an exemption. You are claiming, well, we have to make known this song. But in subsection (c) (2), it says—and let me just read it—it says: "That a program embodying a performance of a nondramatic or musical work of a religious nature."

Now, when you say "nonprofit," actually the law says that this particular exemption applies only to a nondramatic musical work of a religious nature. It is a specific and particular exemption only for

religion, as I read it.

Dr. ZIMMERMAN. Well, of course, we have no case to make for others. I mean, it could well be that it should be broadened so that the real thrust of it is the nonprofit aspect of it, because to us, this is a very

important component.

Mr. Drinan. Well, sir, when I read this carefully, I was hoping you might be able to save yourself. If you go back to (b), if you had that language in, it would be more acceptable, that is, that it would not be an infringement of copyright for "a governmental body or other nonprofit organization" and so on. But that language is left, and it is narrowed down to only musical work of a religious nature. So that is a specific exemption for something that has to be exclusively religious, and that I find it difficult to justify.

Dr. ZIMMERMAN. We would have no objection to that wording, sir. Mr. Drinan. Well, loads of other people would, not merely SESAC, but loads of other people. I mean, if every nonprofit organization—I mean, if the Birch Society could get its records out there without pay-

ing anybody, I think that certain people might object.

Well, I thank you for your testimony. It has been illuminating.
Mr. Kastenmeier. The gentleman from New York, Mr. Pattison.

Mr. Pattison. I am a little bit confused, I think, about the difference between what we are talking about here and the 2-cent or 3-cent what-

ever it is going to be, right for reproduction.

Mr. CIANCIMINO. It is basically the same right, Mr. Pattison. In the area of the recording industry, it has been codified by a compulsory license of 2 cents. In other areas of mechanical reproduction, such as by syndicated program producers, by radio or television producers where works are being reproduced but not in the form of commercial recordings which are sold by Columbia or Decca, there is no codification of the statute there. And industry practice has built up the price of the \$10 per year per title for unlimited use. But basically, it evolves from the same mechanical right that is used by the commercial record companies.

Mr. Partison. So there isn't any question but if this language that we are talking about were absent that a religious or any other organization could find its own performers and make a disk—right?—and

sell it or give it away or anything else and pay 2 cents?

Mr. Clancimino. Not to the public, but to transmitting organizations as defined in 112(c), to radio stations primarily. Section 112(c) is a very limited area of mechanical reproduction rights, which are being used by program reproducers in the religious area and then disseminated to radio stations for a performance over the air. That is the only thrust of 112(c).

But, I thought your question was on the origin of the mechanical right as compared to the commercial phonograph record field. They both originate from the same right, from the same portion of section

1(e) of the 1909 act.

Mr. Pattison. Well, I am still a little bit confused about that, but let me get on to another question.

Mr. MIDLEN. While we are on that, may I respond to that particular

aspect, Congressman Pattison?

Mr. Pattison. Yes.

Mr. MIDLEN. This point has been discussed with the Senate Subcommittee on Patents, Trademarks, and Copyrights and specifically with the chief counsel. The view expressed there, and with which we agree, is that the provisions in schion 115(c)(2) concerning that 2 cents matter with respect to realities payable under compulsory license, that is designed to apply to those reproducing phonorecords for commercial sale and would not apply to nonprofit organizations making mechanical reproductions of musical works of a religious

Mr. Ciancimino. I believe the gentleman is referring to the current position of section 115, is that correct, as appears in the revision bill?

Mr. Midlen. 115(c)(2).

Mr. Ciancimino. In the current revision bill? Is it the 1909 statute or the current revision bill you are citing?

Mr. Pattison. That is the current bill.

Mr. Ciancimino. That is the current bill, yes.

Mr. Patrison. I am trying to sort that out in my mind.

Mr. Ciancimino. But there is no such provision in the 1909 law.

I think that is what your question was.

Mr. Parrison. Just a point of information. Isn't it true that the reason that ASCAP and BMI do not license mechanical rights is that they are, isn't it true, that they are prohibited from doing so under the consent decree? Harry Fox basically does that.

Mr. CIANCIMINO. I don't profess to be an expert on the ASCAP consent decree. I do know that historically ASCAP's area of representation was in the performance rights area. I am not prepared to answer any questions on the ASCAP consent decree at this time.

Mr. Parrison. Well, that is my impression. I think that they just

can't get into that business, frankly, but I may be wrong about that.

If this language stays in the bill, I am troubled about the distinction between what is religious and what is not. Is Mahalia Jackson's "Amen," for instance, is that a religious song? I mean, it is played

over rock stations and played all the time everywhere.

Mr. CIANCIMINO. This is one of the very real problems. Ervin Drake, who is the president of the American Guild of Authors and Composers and who had submitted a letter when I testified before the Senate and it is appended to the Senate record, Ervin Drake wrote the song, "My Frayer," which is a very popular copyright. It wasn't written as a religious copyright. However, it is used in my Catholic Church, for example, in Sunday services, at Sunday Mass. Ervin Drake has told me and a copy of his letter to the Senate is attached, which I have here, if anyone cares to see it—and he has told me and it specifically states the fact that it was not written as a religious copyright. And this is the area where we are going to get into trouble. This is the area of definition, which is going to cause a whole body of litigation, it seems to me, if 112(c) ever becomes law. And it is really an unwanted area, in my opinion, of litigation. I don't see any justification for it at all.

Mr. Pattison. Could we have some response from the religious people on that?

Mr. Midlen. Yes---

Mr. Pattison. How are we going to define this "of a religious nature"? Assuming it is a good provision in the bill, how are we going to define it?

Dr. ZIMMERMAN. My reply, Congressman, would be that if the program itself is for a religious purpose and it is in the context of a religious presentation that it is used, then the numbers used there would be construed to be used for a religious presentation. And I think——

Mr. Pattison. It seems to me, if you start every morning off with a prayer, you will then be exempt for the rest of the day.

Dr. ZIMMERMAN. Well, Mr. Pattison-

Mr. Pattison. I mean, I don't want to be facetious. I am serious.

Dr. ZIMMERMAN. No, I understand. I want to be very honest, too. I would not construe that as what you are talking about at all. We are not talking about a broadcast station coming on with a devetional of some nature, which many of them do.

Mr. PATTISON. Yes.

Dr. ZIMMERMAN. We are talking about a presentation of a specific religious broadcast within the context of a program or service that has been produced by a religious broadcaster. And I cannot think of exceptions that would be made in the average religious broadcast that I know anything about, Congressman, that would bring in secular music.

Mr. Pattison. Well, I take it—and I don't want to beat this to death—but I take it that would also include lots of organizations which people may or may not approve of, for instance, Dr. Moon's organization or "Children of God" or a variety of other organizations like "Universal Life Church," like lots of organizations that call themselves religious, like "Ethical Society," but which may not be religious in the normal Christian or Jewish or even any of the major religious traditions to actually be religious. So that if a broadcaster decided that he was going to call his program religious, that doesn't necessarily refer to a Christian God or Jewish God as we know it, perhaps, in our culture. Wouldn't you agree with that?

Mr. Midlen. If I might respond to that? The criteria is not whether the organization is religious or not religious. The criteria is whether it is a governmental body or a nonprofit organization, which then in turn meets the rather strict criteria which is set out in section 112(c), namely, one recording for nonprofit purposes for broadcasting. And it is spelled out there with considerable specificity, so that it is quite

narrow.

And in response to your earlier question, I think that the amount that you were referring to is the 3 cents in section 115(c)(2) of this bill, and it is the position of the staff of the Senate Subcommittee on Patents and Copyrights that it does not cover such nonprofit aspects as are contemplated in section 112(c).

Mr. Kastenmeier. I would observe from the colloquy and from what Mr. Midlen says that while the intention, as expressed by Dr. Zimmerman, is to protect religious programs; in fact, we are pro-

tecting programs of nonprofit organizations, of governmental bodies, et cetera, which may happen to have religious music and only as to

religious music.

I think I have observed religious programs that have had sectarian music, too, for various purposes on such programs. They would not, presumably, be protected, because they are not musical works of a religious nature. And notwithstanding the needfulness of the organization to be excluded, for the purposes you have cited, they would apparently have to comply with the copyright payments under this section and not be covered under this section.

Well, in any event, gentlemen, I wish on behalf of the subcommittee to thank you, all of you: Dr. Zimmerman, Mr. Midlen, Dr. Armstrong, and Mr. Ciancimine.

The last witness today is that of public radio and the handicapped. First, we would like to welcome Dr. Walter Sheppard, representing - the Association of Public Radio Stations.

Dr. Sheppard, you may proceed first.

TESTIMONY OF DR. WALTER SHEPPARD, REPRESENTING THE AS-SOCIATION OF PUBLIC RADIO STATIONS. ACCOMPANIED BY DR. MARGARET ROCKWELL OF WASHINGTON EAR; MATTHEW B. COFFEY, PRESIDENT, ASSOCIATION OF PUBLIC RADIO STATIONS; AND PHILIP HOCHBERG, COUNSEL

Dr. Sheppard. Thank you, Mr. Chairman. With me at the table are Dr. Margaret Rockwell, director of the Washington Ear, which is the print handicapped service of WETA-FM here in Washington to answer any questions that the members of the subcommittee may have about the operations of such services, and also Matthew Coffey, the president of the Association of Public Radio Stations and Mr. Philip Hochberg, counsel to the association.

We welcome the opportunity to testify here this morning on those issues we were unable to explore in detail at the hearing on July 10.

Throughout the recent history of the omnibus copyright revision bill, the Association of Public Radio Stations had maintained the need for preferential treatment—and indeed that is exactly what it is—for one of its special encleavors. In addition, we have requested an additional exemption for performance on public radio.

The members of this subcommittee are charged with the responsibility of making public policy decisions on copyright. There is nothing immutable in the concept of copyright protection; it is constantly being subjected to overriding questions of public policy. One need only look at the exemptions already embedied in the 1909 act and H.R. 2223 as examples. The concept of the compulsory license is but a further refriement of this principle.

TOTAL EXEMPTION FOR SERVICE TO THE PRINT HANDICAPPED

In what must be regarded as an innovative use of the broadcast medium, a growing number of public radio stations are now providing a special service designed for the print handicapped. This service is being made available through a part of the FM band which requires a special receive The purpose of this service is to give access to printed material to the blind or those otherwise too physically handi-

capped to read.

Must someone—simply because he has no sight—be denied the timely information contained in the daily newspaper or weekly news magazines? Must he rely on 3½ minutes of news on the hour and headlines on the half hour? Is it absolutely necessary that he wait months before being able to hear a book being read via talking records?

We brought this issue to the attention of the Senate Copyright Subcommittee staff this spring. On May 28, 1975, in a meeting between representatives of public broadcasting, the copyright holders, and the Senate subcommittee staff, language was drafted which resolved a significant part of the print-handicapped problem. The Senate sub-

committee has approved that as section 110(8) of S. 22.

While the addition of this section resolved any question of performance, it did not resolve the section 112 question which makes a program recording a copyright violation. In other words, section 110(8) would exempt a work performed on the local service for the print handicapped. However, if a recording of that initial performance was made to facilitate a second performance on another print-handicapped service, that recording would violate section 112.

Questions will be raised as to the "free ride" that the blind will now be getting. And we concede that point to you. Not only will the blind be getting special treatment, but so too will those who for other physical reasons cannot read. But we must consider this: How many newspapers, magazines, and books are ever purchased by the blind and those with associated physical disabilities? A human right of access

to information in a usable form is the issue.

As a matter of public policy, the choice seems clear. This right

should not be denied.

PERFORMANCE TO THE PUBLIC

Since 1909 noncommercial radio has been exempt from the payment of copyright fees under the "not-for-profit clause." Public radio is asking the committee to continue this exemption by amending H.R. 2223 to reinstate the exemption for local public radio performances.

Without this exemption, classical music may well disappear from the airwaves. The number of commercial classical stations is dwindling. Two stations have changed formats just since your July 10 hearing, WHAS in Louisville and WBAL in Baltimore. The public radio stations are becoming the single source of over-the-air performance for classical composition. If payment is imposed, not only will the public lose a valued cultural service, but the young composers will lose the last remaining radio outlet for their works.

Why will this happen? I think there are four reasons. I will mention

them briefly now and expand on them later in questioning:

(1) The inability to determine rights to classical music, since only one record company consistently provides that information. (2) The uncertainty over public domain music with the emergence of derivative or critical editions of previously public domain works. (3) The inability of the societies to guarantee that they cover 100 percent of the composers. Some estimates indicate only about 75 percent of classical

composers belong to the societies. The stations could find themselves dealing with individual composers in the hundreds. (4) The lack of local station resources. Clearance requires the filling out of forms and recordkeeping. Public radio stations are required to operate 16 hours a day, 7 days a week with an average full-time staff of eight people.

Frankly, Mr. Chairman, having never been subject to copyright payment, we don't know the full meaning of the inclusion. What we do know is that we strain our resources to the limit daily to provide a public service to the print handicapped and to the general public interested in serious music. To impose the burden of copyright will cause us to curtail services to no one's benefit.

Thank you, Mr. Chairman.

Mr. Kastenmeier. Dr. Sheppard, do you have the text of the amendment consisting of section 110, subsection (8)? We do not have it before us. Would you read it?
Dr. Sheppard. Yes, certainly. This is a general section on uses of

works that are exempt from copyright infringement:

Performance of a literary work in the course of a broadcast service specifically designed for broadcast on noncommercial educational radio and television stations to a print or oral handicapped audience.

And Mr. Hochberg points out that the text is actually printed in Mr. Karp's statement he has prepared for submission at the bottom of

page 4 of that statement.

Mr. Kastenmeier. Next, we would like to hear—I wonder if you would make room for one of the other witnesses, and then you can remain there and you don't have to get up and so forth. I would like to invite Mr. Townsend Hoopes, president, Association of American Publishers and, as well, Mr. Irwin Karp, counsel, Authors League of America, Inc.

PANEL DISCUSSION: DR. WALTER SHEPPARD, DR. MARGARET ROCKWELL, MATTHEW B. COFFEY, PHILIP HOCHBERG, TOWN-SEND HOOPES, AND IRWIN KARP

Mr. Hoopes. I will be merciful, Mr. Chairman, and I will be brief.

Mr. Chairman, my name is Townsend Hoopes. I am president of the Association of American Publishers, a trade organization composed of approximately 260 member companies and subsidiaries which account for more than 80 percent of the dolla, sales of books and audiovisual materials published in this country. Its membership includes a number of university presses and other nonprofit publishers.

We have been asked to comment on what we understand are two proposed amendments to H.R. 2223 put forward by public broadcasting interests, dealing with special exemptions for the blind and the deaf.

With you, Mr. Chairman, we have been somewhat uncertain as to which of the several informal proposals are at issue here. We are not certain we have seen the language of the ones that are and, therefore, we cannot address them specifically.

We can, however, state our position with reference to two sections proposed by the subcommittee on the Senate Judiciary Committee for inclusion in the Senate bill, S. 22. Section 110(8) would provide that performance of a literary work as part of a program specifically designed for broadcast on noncommercial educational radio and television stations "to a print or oral handicapped audience" is not an infringement of copyright. The publishers' association fully supports the essence of the subsection. We would hope, however, that the Congress will take steps to clarify the somewhat awkward and opaque phrase "print or oral handicapped audience."

In addition, we support the proposed section 710 of S. 22, which would establish procedures whereunder the copyright owner may voluntarily grant a license to the Library of Congress to produce braille copies or phonorecords for the blind and physically handicapped.

We cite these two provisions, Mr. Chairman, to demonstrate that our purpose, with respect to the blind and deaf persons, is to be quite forthcoming on the matter of facilitating their access to literary works through the medium of programs designed expressly or primarily for their benefit. We realize that this position involves the partial relinquishment of rights of copyright owners, and further that it entails a degree of risk and vulnerability to abuse. We nevertheless take this position in the belief that blind and deaf people are deserving of special consideration, and in the trust that all parties concerned will endeavor to be fair and proportionate.

As to specific amendments to H.R. 2223 on this subject, we must reserve our position until we have had an opportunity to study the

language thereof.

Mr. Kastenmeier. Thank you. Mr. Karp, we will now hear from

you

Mr. Karp. Thank you. Mr. Chairman. I have submitted a statement, which I request be included in the record. It is on behalf of the Authors

League.

May I state at the outset that the provisions of proposed section 110(8) that appears at the bottom of page 4 of my statement, which was adopted by the staff of the Senate subcommittee and the subcommittee—

Mr. Kastenmeier. Yes, and it is precisely as read.

Mr. KARP. As I gave, yes.

Mr. Kastenmeier. As was read by Dr. Sheppard.

Mr. Karp. Yes, that is the same language on page 4 of my statement. I just want to make it cl.—that this was not written with the concration of the Authors League. Quite the contrary. When it was proposed, we objected, as we object right now. We objected for what I think are good and sufficient reasons.

In evaluating the proposed—oh, I might say that the other exemption, which I quoted on page 5, was a proposal made by the American Foundation for the Blind, which would go also as clause 8 of section 110. We have, in effect, rival proposals for an exemption, neither of

which we support. We are equally opposed to both of them.

In evaluating these proposed exemptions, it is essential to consider how books are disseminated to the blind under the present provisions of the 1909 act. Under the provisions of the 1909 act, the Library of Congress, for 40 years, has distributed to blind persons recordings and braille editions of thousands of books. This program is conducted by the Library's Division for the Blind and Physically Handicapped.

Approximately 1,000 titles a year are added to the stock of books available on records and cassettes, and 300 to the stock of books in braille, an additional library produces several magazines on records and in braille.

Thousands of copyrighted books have been produced in these recordings, with the consent and only with the consent of their authors and publishers who do not request or receive payment for these uses. The issue here is not payment. The issue is not granting consent. The issue is whether a section of the community, of the creative community in this country, which has proved with a 40-year record its ability to make available its property for free use by the blind, whether they should now have that right taken away, because a group of people in public radio say, without any justification, that they must have this done.

Under the present law, the copyright owner's permission is required to make these recordings and to publish braille editions. Let me emphasize we are not dealing with recordings in the musical section. Section 1(c) of the Copyright Act deals with literary works and gives the copyright owner the exclusive right to make a recording by which his work can be presented, and there is no nonprofit limitation.

As the Library of Congress recently informed Senator McClellan, publishers and authors have been extremely cooperative in allowing us to record materials on a nonfee basis. And we are sensitive to and respect the rights of authors and publishers. And we appreciate the significant contribution in helping us make educational and recreational materials available on braille and on records for use of individuals who cannot read print.

Let me turn and try to summarize briefly my description of the clearance procedures and the production procedures of the Division for the Blind of the Library of Congress, which has produced these thousands of records and made them available across the country

under a voluntary system.

Now, requests for permission to produce recordings and braille copies are made by the Division to copyright owners on a standardized clearance form. After the permission is obtained, and it is obtained in almost every case, then without consideration the records are produced.

As I said, thousands of titles are currently in print, as it were, on records and available. And I would like to leave with the committee this 1972-73 catalog [indicating] which is a log of talking book records. This is only the books produced in that year, and not the catalog available in total. This is just the titles produced in that year, so that you will have some idea of the range and diversity of books available on these records. These records are distributed free of charge to blind persons and those whose physical handicaps prevent them from reading print.

I assume that is what the rather clumsy language "print-handicapped" meant. One of our objection to the language itself is that any illiterate or poor reader is print-handicapped. I assume our

friends didn't intend to include that.

These are made available across the country without charge through divisional or regional libraries or subregional libraries. Now, these recordings are only available to blind persons. Not only is their distribution limited, but technologically, it just happens that they cannot

be played on ordinary record players because they happen to be recorded at 81/3 r/min, which is not a speed that can be played on ordinary phonographs. They have to be played on special phonograph machines, which are distributed to the blind free of charge by the Library's Division of the Blind and the regional libraries.

Now, these books are the primary and most effective means of bringing books to the special audience of the blind and physically handicapped. The thousand titles currently in print under this voluntary system make available enormous diversity of choice, which radio just can't provide. It takes 8 to 12 hours to read a book aloud. Broadcasting would require several daily installments. Any blind person who happened to be interested in the book that a radio station happened to choose, would have to sit at that set for 8 to 12 hours to hear the book in its entirety.

On talking records, he can choose any book he wishes without charge

and listen to it at the time he selects.

Now, this is only by way of setting the background. We are not arguing that radio should not broadcast books. We are simply pointing out that we are not dealing here with some dire emergency that this group of public broadcasters is rushing into the breech to meet. There is a rich and valuable service already provided by the Library of Congress under their voluntary system. We have no objection to subcarrier stations, those which are only received by the blind because of the special frequencies on which they are broadcasting, we have no objections to those stations broadcasting books. But we insist that with a 40-year record of performance, that the Congress can be certain that licenses without charge will be granted by authors and publishers to these stations just as they are granted to the Library of Congress.

We are also certain that we don't deal even with this licensing problem we got into with public radio because the Library of Congress itself can clear these licenses. The Division for the Blind not only idenses the braille editions and records which it produces, but it performs that function for other voluntary, nonprofit organizations which wish to produce this type of material. I dare say that the Division for the Blind, without any great difficulty, could clear these books for use by these closed circuit radio stations, clear them in advance

and clear them without any charge at all.

My last point, Mr. Chairman, involves open-circuit radio and television, which means education. Shall I continue?

Mr. Kastenmeier. Continue.

Mr. KARP. It involves educational or instructional stations which broadcast to the general audience. Here, of course, there is no way of distinguishing between the reading of an entire book or a substantial portion of a book, distinguishing from the entire audience or just to the blind members. The book is read and is read to the whole audience on channel 13 or any other station that would be entitled, under this exemption, to do this.

Mr. Kastenmeier. May I ask Dr. heppard to respond to that point? When you are enabling the local radio station to broadcast, presumably to the blind audience, you have no way of, do you, of in-

suring that that is the audience you have, in fact?

Dr. Sheppard. That is true, Mr. Chairman, if you broadcast on the open channel. Of course, if you are broadcasting on the subchannel, then distribution of the special receiving sets is quite a controllable

factor, so there could be no problem there.

Technically, AM stations, and we have some in the public radio system, cannot avail themselves of this kind of transmission because it is technically not available to them. WHA in Madison is one example of a station that cannot institute SCA transmission, because the trans-

mission—because the technology does not exist.

I would also say that for stations that do not have or would not utilize SCA for this purpose, these stations are not going to devote a great deal of their daily schedules to the transmission of this kind of material, because they have an obligation to serve the general audience as well. We are not going to sit in Hersey, Pa., and read the entire morning edition of the Harrisburg Patriot News and then read the afternoon edition of the Harrisburg Evening News. It is not feasible.

Mr. Kastenmeier. The gentleman from Massachusetts.

Mr. Drinan. I am sorry, gentlemen, we have a vote and we just have to go to it. But, I see the controversy. I would hope that it could be resolvable amongst yourselves. I am happy to know all of the things the Library of Congress does. I see the point that Dr. Sheppard brings up, and I would hope that we would consciously or otherwise or inadvertently wouldn't deprive the blind or deaf of any services, but I amimpressed by what is now being done. I hope that within the parameters of traditional copyright laws, we can continue that.

As I say, we have to go. I personally cannot come back. But I would welcome any further elaborations of the conflicts involved here, so

that we could have that for the record.

Thank you.

Mr. KASTENMEIER. The gentleman from New York.

Mr. Parrison. Do we plan to come back?

Mr. Kastenmeier. We do not. Now is your opportunity to ask questions.

Mr. Patrison. Well, I congratulate Mr. Karp for his consistency. I

congratulate Mr. Hoopes for his inconsistency.

I really think I understand the issue and I don't have any questions. Mr. Hochberg. Mr. Chairman, may I add one comment? One of the points Mr. Karp did not and indeed perhaps would not address himself to is the problem that so much of what the services for the handicapped do deals with daily newspapers or news magazines. An attempt to get clearances on any timely basis may well be impossible.

Mr. Karp. Mr. Chairman, I would like to emphasize I am not here speaking for the newspaper publishers or publishers of magazines. I am concerned with books, books written by authors. What Mr. Hoopes is telling you is all right with publishers, or the collection of rights that don't usually belong with the publishers to begin with: The right to make recordings, the right to broadcast books on radio and television, and other rights that can be interfered with. But I insist we must make it clear what we are really saying this can be done under a voluntary system, and even the open channels can be licensed under a voluntary system.

We just can't afford to make the political judgment that somehow this book will jeopardize our position under the Mathias amendment,

and therefore, we must except it. There is no merit to this.

We think we have shown a very strong history——

Dr. Sheppard. Mr. Chairman, Dr. Rockwell has a comment.

Dr. Rockwell. I would like to briefly state that as not only the director of the Washington Ear, which operates a service for the blind and physically handicapped who cannot read print, but as a long-term user of the Library of Congress program, that there are problems in securing copyright clearance in that best-selling books and particularly books on timely topics often take 2 or 2½ years before they can reach the homes of people who cannot read print copies because of delays.

As a matter of fact, I recently was speaking to a member of the Library of Congress saying that because the publishing houses apparently were cutting back on their own staff, that the length of time it took to secure these copyright clearances was lengthening. What the print handicapped, and I agree, I dislike that terminology—or what services such as the Washington Ear are trying to do is to read bestselling books and timely books while they are current and being discussed by the community, to read them on an installment basis. I appland the fact that the publishers have an excellent record in making books available for the blind and physically handicapped. I have enjoyed many of these myself through the years. But, I would also like to add that the staffs such as at Washington Ear are very, very small. We are operating under many strains. And the procedure of securing copyright clearance would impose a crippling burden upon our operation. I don't think that the Library of Congress is prepared to assume the responsibility for these services, which are located throughout the country in securing clearances for us. They apparently are having their own present difficulties.

Mr. Karp. Mr. Chairman, I think you really have to talk to the Library of Congress, because somehow I get an entirely different picture about how long it takes to clear. I know there are 1971 and 1972 best-sellers in this book, and many of them are by Authors League members. I do know that section 710 of the act would facilitate the clearance procedures, making it almost automatic. What we are proposing here is clearances can be made as early as the day of copyright

registration.

Mr. Kastenmeier. I take it you are not proposing any changes in the

Mr. KARP. No, I am asking you to adopt the law as it is.

Mr. Kastenmeter. I thank those appearing here.

Mr. KARP. Except for this amendment in the Senate bill.

[The prepared statement of Irwin Karp follows:]

STATEMEN: OF IRWIN KARP, COUNSEL, THE AUTHORS LEAGUE OF AMERICA, ON PROPOSED EXEMPTIONS FOR BROADCASTING READINGS OF BOOKS

Mr. Chairman, my name is Irwin Karp, I am counsel for the Authors League of America, the national society of professional writers and dramatists. The Authors League appreciates this opportunity to state its views on proposed exemptions which would permit the broadcasting of books and other literary works, without the author's permission, by non-commercial stations to audiences which include blind or aurally handicapped persons. The texts of these proposals are quoted at the end of this statement.

The Authors League urges that these proposed exemptions should not be added to the Copyright Revision Bill. They are not necessary to bring books to the blind. These exemptions would permit unauthorized broadcasts of books on programs that reach general audiences. They are broadly and ambiguously worded.

DISSEMINATION OF BOOKS TO THE BLIND UNDER THE PRESENT COPYRIGHT LAW

In evaluating the proposed exemptions, it is essential to consider how books are disseminated to the blind under the present copyright law. Sec. 1(a) grants authors the exclusive rights to print and publish copies of their books. These rights cover the production and distribution of braille editions which cannot be published without their permission. Sec. 1(c) grants authors the exclusive rights to make transcriptions or records of their books. These rights include the production of recordings of their books which cannot be made without their permission. Both sets of exclusive rights apply to non-profit as well as commercial uses.

Functioning under these provisions of the present Act, the Library of Congress has, for forty years, distributed to blind persons across the nation recordings and braille editions of thousands of books. This program is conducted by the Library's Division for the Blind and Physically Handicapped. The Division currently adds approximately 1,000 titles a year to the stock of books available on records and cassettes; approximately 300 titles a year to the stock of books in braille editions. It also produces 23 magazines on records, and 23 in braille.

Thousands of copyrighted books have been produced in these recordings and braille editions with the consent, and only with the consent of their authors and publishers—who do not request or receive payment for these uses of their books.

As the Librarian of Congress recently informed Senator McClellan, "Publishers and authors have been extremely cooperative in allowing us to record and emboss print materials on a non-fee basis... We are sensitive to and respect the rights of authors and publishers, and we appreciate their significant contribution in helping us make available educational, recreational and informational materials in braille and on records for use by individuals who cannot read print."

THE LIBRARY'S CLEARANCE AND PRODUCTION PROCEDURES

Requests for permission to produce recordings and braille copies of books are made by the Division For the Blind to copyright owners, on a standardized clearance form. After permission is received, recordings or braille editions are produced for it by various organizations. Recordings of books, Talking Books, are produced by two non-profit organizations: The American Foundation for the Blind and American Printing House for the Blind. These are professionally produced recordings. The narrators, often actors or announcers, are paid; the technicians are paid. As we have noted, authors and publishers do not receive compensation for their permission to use their books.

compensation for their permission to use their books.

The thousand or so titles currently produced each year on Talking Book records include works in the public domain and hundreds of copyrighted books. The copyrighted works include books in every field: action, biography, philosophy, science, education, economics, etc. The list includes established works and current books, including best sellers. You can get some idea of the rich and diverse collection available by glancing through this copy of the adult Talking Books catalog for 1972–1973, listing titles produced in recordings from January 1972 to December 1973.

Talking Book records are distributed free of charge to blind persons and the "physically handicapped." (i.e., those whose physical handicaps prevent them from reading conventional print.) The recordings are borrowed from regional and subregional libraries which obtain them from the Division for the Blind. There is no time limit on borrowing, and it can be done by mail.

TALKING BOOK RECORDS AND BRAILLE COPIES SERVE AN AUDIENCE OF BLIND AND PHYSICALLY HANDICAPPED USERS

Obviously braille copies are used solely by blind persons. Talking Book records also are distributed only to blind or "physically handicapped" persons; and only this audience can use them. Talking Book records are recorded at 8½ r.p.m., a speed which cannot be played on commercially produced record players. Special phonographs are required, and these Talking Book machines are loaned without charge to blind and "physically handicapped" persons.

Talking Books are the primary and most effective means of bringing books to this special audience. The vast reservoir of books on records—approximately 10,000 titles are currently available—provides individual users with an enormous diversity of choice radio and television could never approach. It takes from 8 to 12 hours to read a book aloud. Broadcasting it would require several daily

installments. Any blind person who happened to be interested in the book a station chose would be tied to its schedule. Talking Books records enable him to read books of his own choice, at times he selects.

READINGS BY "CLOSED CIRCUIT" RADIO STATIONS

Proponents of the exemptions contend they are needed to permit sub-carrier radio stations to broadcast readings of books to the blind. These point-to-point broadcasters cannot be received on ordinary radio sets. Special receivers are required, and these are supplied only to the blind and physically handicapped. These "closed-circuit" radio stations broadcast news reports, articles, advertisements for necessities and other current non-book information and material.

A copyright exemption is not necessary to enable these stations to broadcast readings of books. They can obtain permission without charge—just as the Division for the Blind has obtained permission to make Talking Book records of thousands of books for distribution to the same audience. Authors and publishers will not hesitate to grant permission free of charge since these sub-carrier stations, like Talking Books and braille copies, reach an audience composed solely of the blind and physically handicapped.

The clearance of permissions could be arranged by the Division for the Blind—just as it systematically arranges permissions for its braille editions and Talking Book records—and as it arranges permissions for other non-profit organizations

to produce and distribute such materials.

READINGS BY "OPEN CIRCUIT" RADIO AND TELEVISION STATIONS

The proposed exemptions are not limited to "closed circuit" radio stations serving only the blind and physically handicapped. This would apply to programs, programs broadcast by "open circuit" non-commercial radio and television stations which reach a much wider audience, the sighted as well as the blind and physically handicapped. Any reading of a book broadcast by such stations would reach its entire audience, although the program were "specifically designed or presented for blind" listeners. That purported limitation, in the proposed exemptions, would be ineffective.

The Authors League does not contend that non-commercial stations should not broadcast readings of books, because their audiences are not limited to blind persons. But it believes that permissions for these programs should and can be arranged on a voluntary basis—just as the vastly greater production of Talking Book records by the Division for the Blind has successfully been conducted for

years under a voluntary licensing system.

As indicated in the League's July 10th testimony on the proposed public broadcasting amendments, occasionally the broadcast of a book to audiences of nonprofit stations may reduce its sales; or prevent the author from licensing its use on records or tapes, or in commercial radio, television or motion pictures. Professional authors receive most, and usually all, of the income from these nonpublishing rights.

Copyright owners' permissions are required under the present law to produce and distribute the Talking Books records and braille editions that have brought books to the blind for forty years. Their permission should be required to dis-

seminate their books by broadcasts on non-profit stations.

THE PROPOSED EXEMPTIONS SHOULD NOT BE ADOPTED

For reasons we have indicated, the proposed exemptions are unnecessary, and unfair to authors. Publishers and authors of books have demonstrated their commitment, over four decades, to making their books available without charge to the blind and physically handicapped. The thousands of copyrighted books distributed on Talking Book records and in braille attest to that commitment—and prove beyond doubt that books can be made available to this audience under a voluntary licensing system, without expropriating authors' rights.

Proponents of the exemptions contend that non-profit stations are free to broadcast books under the present law, and that the exemption is necessary to continue that right under the Revision Bill. We disagree. In order to broadcast readings of a book, it is necessary to make a recording of the reading. It is practically impossible to make even a single "live" reading, lasting 8 to 12 hours. It is utterly impossible to make repeat broadcasts of the reading, or make it available

to other stations, without making a recording. As we have noted, the present law grants the author the exclusive right to make recordings of his book, whether they are produced by non-profit or commercial organizations. (And as we noted in our July 10th testimony, the 1909 exemption for "live" 1 n-profit readings never contemplated the vast audiences of radio or television.)

THE PROPOSED EXEMPTIONS ARE BROAD AND AMBIGUOUS

The Authors League opposes the proposed exemptions because of their purpose and effect, not because of deficiencies in wording. But the proposals are broad and ambiguous.

The first would add to Sec. 110 an exemption for

(8) performance of a literary work in the course of a broadcast service specifically designed for breadcast on non-commercial educational radio or

television stations to a print or aurally handicapped audience.

It is not clear whether "print handicapped" means blind persons and those whose physical handicaps prevent them from reading conventional print; the definitions used by the Division for the Blind. Or whether it also includes the illiterate or poor readers, who also are "print handicapped." Obviously the former definition is the only one consistent with the apparent purpose of the exemption.

It is not clear whether "performance" of a literary work is limited to reading it; or whether the proponents are stretching for the right to give dramatic ren-

ditions, which would make the exemption even more damaging to authors.

It is not clear whether a "literary" work means a book, article or other "nondramatic" work; or also embrace other classes, which would make the exemption

even more damaging.

It is not clear what circumstances would render the broadcast "reading" of a book a "broadcast service specifically designed for broadcast . . . to a print . . . handicapped audience"—when broadcast on a station which reached an audience of signted as well as blind persons. It seems obvious that the reading of a book to such an audience cannot have that limited purpose.

The second proposal would add this exemption to Sec. 110:

(8) performance or the reading aloud (whether in person or by phonorecords) of books and other literary works, musical scores, instructional texts, specialized materials and other printed matter in the course of a broadcast service specifically designed or presented for blind and other physically handicapped persons (who are unable to read normal printed material as a result of such limitations) on non-commercial educational radio or television, including non-commercial broadcasting on any subsidiary carrier authority or cable transmission. Provisions of this subsection shall apply to non-commercial telecasts specifically designed for the aural handicapped.

This proposal contains a more precise definition of the blind and physically handicapped, but contains the same dangerous generalities and ambiguities of the

first proposal, discussed above.

We oppose both proposals. And we urge their proponents to heed the words of

the Librarian of Congress:

We are sensitive to and respect the rights of authors and publishers, and we appreciate their significant contribution in helping us make available educational, recreational and informational materials in braille and on records for individuals who cannot read print,

Mr. Kastenmeier. This will conclude the regular copyright hearings other than to invite the Register of Copyrights to offer testimony in this room on October 2 at 10 o'clock in the morning.

I should also say we have a letter from Mr. Edward W. Chapin, counsel to Broadcast Music, Inc., which will be accepted and made a part of the record on this subject.

[Mr. Chapin's letter follows:]

BROADCAST MUSIC, INC., New York, N.Y., September 10, 1975.

Hon. ROBERT W. KASTENMEIER. Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR CHAIRMAN KASTENMALER: BMI would like to comment on the background statement filed with the Subcommittee on Courts, Civil Liberties and the Administration of Justice by the Association of Public Radio Stations.

Inasmuch as that document was prepared prior to the July 10th hearing before the Subcommittee it is understandable, but regrettable, that it contains a number

of assumptions which run counter to fact.

There is no problem of the clearance of musical works for use in nationally distributed programs, or, indeed, for use in local programs. The fact is that APRS can, as commercial stations have been doing for decades, obtain immediate blanket clearance of copyrighted music through easily negotiated licenses with the performing rights licensing organizations. The fact is that APRS will need no added personnel to perform a clearance function, for such a function will not exist.

There is no intention on BMI's part to charge such exorbitant fees as are cited by APRS. The fact is that BMI's lowest rate for commercial broadcasters is \$18 a month, a far cry from the APRS bogey of \$15,000 to \$20,000 annually. BMI has already told representatives of Public Broadcasting that we are ready to discuss an equitable rate. Toward the establishment of such a rate we have asked for data concerning rates charged by the owners of other rights equally necessary to

programming.

There is no serious problem of administrative burden placed on APRS after the negotiation of a BMI contract. At most we would require, as we do of other brondcasting licensees, a log of the music played for one week each year. Many stations already make this sort of information available to their listeners on a regular basis. This has been provided us by commercial stations with personnel even lesser in number than the average eight full-time employee programming staff APRS cite. The fact is that such an obligation is thoroughly in keeping with APRS' stated and laudable "obligation to the composer of our time." Fulfilling this simple responsibility will assure that these composers of our time receive money for the public performance of their music on public radio.

Public Radio does, indeed, "make potential record buyers aware" of contem-

Public Radio does, indeed, "make potential record buyers aware" of contemporary music. But this can also be a dubious blessing. The potential average sale of contemporary recorded concert music is about 2,500 copies. When APRS, "one of the few outlets for the work of young contemporary composers," schedules such music, tape recorders and cassettes whir!. That performance is bootlegged for personal use, generally reducing sales. The payment by APRS for a license from BMI will certainly not end this reprehensible practice, but it will slightly

alleviate an economic wrong.

We can only repeat the points we made on July 10th at the hearing before the Subcommittee:

Public broadcasting will have no difficulty in negotiating a contract.

Public broadcasting will have no serious financial burden placed upon it.

Public broadcasting will have no serious administrative problems rising from reporting one week's music programming a year.

The sole problem is how much public broadcasting is prepared to pay for the music it uses so lavishly.

Respectfully,

EDWARD W. CHAPIN.

Mr. Kastenmerer. The subcommittee thanks those of you present who have been witnesses and the record will be held open until October 2 for the filing of additional statements.

That concludes this hearing.

[Whereupon, at 1 p.m., the subcommittee recessed, to reconvene at 10 a.m., Thursday, October 2, 1975.]

[Subsequently, the following two letters were submitted on behalf of Association of Public Radio Stations:]

Association of Public Radio Stations, Washington, D.C., October 2, 1975.

Hon. ROBERT W. KASTENMEIER.

Chairman, Subcommittee on Courts, Civil Libertics, and the Administration of Justice, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHARMAN: On behalf of the Association of Public Radio Stations, I am writing to you (and to the other members of your Subcommittee) as you prepare to close the record in your hearings on H.R. 2223.

I am writing for the primary purpose of offering to you language which would effect changes which we have sought in your legislation to allow service to the print or aural handicapped over the facilities of public broadcasting stations. (Obviously the interests of public radio lie exclusively with the print-handicapped (largely the blind) but many of the comments are applicable also to those with hearing handicaps.) Enclosed is language exempting performances over public broadcasting to the print or aural handicapped (such language having been taken from the current version of 8. 22, the counterpart bill in the Senate) and additional "perfecting" language to resolve a small, but important, problem that has arisen.

Background of Hearing

On two occasions, the Association of Public Radio Stations has appeared before you, urging special treatment of our services for the print-handicapped. On July 10, 1975, we briefly alluded to this question in our oral remarks and more fully treated it in a written statement accompanying our appearance. Briefly, we described the technical nature of this service and its growing use across the country. In that statement, we stressed the need for statutory language exempting both the performance and a recording pursuant thereto from any copyright liability.

Representatives of the Association of Public Radio Stations again appeared before the Subcommittee on September 18, 1975. This appearance was specifically directed to discussion of the service to the blind. The statements reviewed again the status of the legislation and stressed the need for "perfecting" language in Section 112 to accompany that already adopted by the Senate in Section 110.

Background of Service

Begun in 1969 in Minnesota, radio reading services designed specifically for the print-handicapped have spread across the country. At present, there are approximately twenty closed circuit systems for the blind and physically handicapped; each month, new cities announce plans to begin service as soon as possible. Generally, a portion of the FM band (requiring a special receiver) is used.

Typical services throughout the country have a small paid staff and all reading is done by trained volunteers from the community. The service offers a variety of programs seven days a week. Funds to purchase the special receivers required to pick up the closed circuit programs, additional capital outlay and special projects must be obtained from local foundations, service clubs and individual gifts.

Need for Service

Radio systems for the blind and physically handicapped are known to be an excellent means of filling in the gaps between the Library of Congress Talking Book Service and the programs offered by radio and television. The former produces a limited number of books and magazines for the entire country and can neither be local nor current in focus. After a title has been selected by a committee, copyright clearance must be sought, the book must be transcribed into braille or recorded form, reproduced into the proper number of copies and finally transported through the mails to the various regional and sub-regional libraries located in the United States and its possessions where the books will be sorted, processed, and ultimately distributed to readers upon request.

The regional and sub-regional libraries are chronically understaffed, and it is not uncommon for a print copy of a book to be available eighteen months to two years in local book stores before it can be enjoyed by the blind or physically handicapped. In addition only a limited number of copies are available for distribution and many readers must wait a number of months before the recorded book can be sent to them. Of equal significance, at least, is the use of newspapers and magazines. Newspapers should be heard the day they are published and magazines within the same week or month. However, the need to secure copyright clearance could result in making this new medium no more effective than other services in this respect. The paperwork would necessarily cause delays, and the burdens placed upon small staffs would cause further delay or affect the quality of the service in general because the time and the energy of the staff would be diverted from providing a variety of high quality programming for those who need it.

As APRS has constantly stressed, there must be a Congressional recognition of service to the print-handicapped. Absent a statutory exemption, it is likely that the entire service would likely cease operation or would be forced to change so significantly that it would be of little value to the print-handicapped.

The service is indeed unique. It fills a void of information to the blind; it enables them to have access to material that they would not have in any other way. If the resolution of copyright is overladen with public interest considerations, there can be no doubt that this type of amendment offers greater benefits to the public than any alleged detriment to the creative community.

Statutory Language-Performance

Notwithstanding the allegations by The Authors League of America, APRS has always supported the language adopted by the Senate Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary as Section 110(8). This reads as follows:

Notwithstanding the provisions of Section 106, the following are not in-

fringements of copyrights; . . .

(8) Performance of a literary work in the course of a broadcast service specifically designed for broadcast on noncommercial radio and television stations to a print or aural-handicapped audience.

APRS urges the adoption of this language by the House.

Statutory Language—Recording

In addition, "perfecting" language is needed to resolve the following problem: a reading ("performance") of the Washington Post over the local print-handicapped service from 7 a.m. to 9 a.m. is exempted by new Section 110(8). A recording is made of that performance for playback from 10 a.m. to noon. In addition, that tape is exchanged with the Richmond service. Both uses—rebroadcast and exchange—obviate the need for additional volunteer help. However, that recording violates the exclusive nature of Section 106(1). Language is therefore needed to work hand-in-hand with the Section 110(8) exemption. We are enclosing suggested language—which tracks Section 110(8)—for an exemption covering that recording. This may be done, we suggest, in one of two ways: amend Section 112(b) or add a new Section 112(e). (In proposing a change in Section 112(b), APRS hastens to add that the change suggested must not be interpreted as an endorsement of the limitation on the numbers of copies currently a part of Section 112(b)).

The Association of Public Radio Stations/wishes to thank you, Mr. Chairman, for your consideration of these questions and wishes to note its appreciation of the unfailing courtesy that has been shown to us by you, members of the Subcom-

mittee and the staff.

Sincerely.

MATTHEW B. COFFEY,

President.

(Attachment A)

Addition of New Subsection 112(e)

Notwithstanding the provisions of Section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization, entitled to transmit a performance or display of a work under Section 110(8) to make copies or phonorecords of a particular transmission program embodying the performance or display.

(Attachment B)

AMENDMENT OF SUBSECTION 112(b)

Notwithstanding the provisions of Section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work,

(1) under Section 110(2) or under the limitations on exclusive rights in sound recordings specified by Section 114(2), to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display, if—

(A) no further copies or phonorecords are reproduced from the copies or

phonorecords made under this clause; and

(B) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

(2) under Section 110(8), to make copies or phonorecords of a particular trans-

mission program embodying the performance or display.

[The inclusion of Subsection 112(b)(1) herein is for drafting purposes only and should not be constituted as any endorsement of the limitations contained therein:

Association of Public Radio Stations, Washington, D.C., October 2, 1975.

Hon. Robert W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Since the earliest days of broadcasting in the United States, noncommercial (public) radio has been exempt from the payment of copyright fees for performances under the "not for profit" clauses of Sections 1(a) and 1(e). Public radio is now asking the Subcommittee to continue this exemption by amending H.R. 2223 to reinstate the exemption for local public radio performances. Our request is based on several points:

The threatened disappearance of classical music from the air. The benefit derived by composers from public radio performances.

The complex technical and financial problems music performance clearance raises.

We would like to examine each of these points in detail.

THE THREATENED DISAPPEABANCE OF CLASSICAL MUSIC FROM THE AIR,

Without the exemption requested by local public radio, classical music may well disappear from the nation's airwaves. It is quite clear that the number of commercial stations playing classical music is dwindling. Indeed, between the Subcommittee's hearings on July 10 and September 18, two more commercial classical music stations changed their formats—WHAS-FM in Louisville and WBAL-FM in Baltimore. The September issue of Radio Music Monthly reports. "The FM station (WHAS), according to program director Brench Boden, just couldn't make financial ends meet with a classical music format, an unpleasant familiar story to too many other stations in this country." Mr. Boden cites a loss of over one million dollars as "the general factor" that led to the decision to make the change.

The same issue of Radio Music Monthly reports that WBAL-FM "also went under for financial reasons" because the station could not get sufficient adver-

tising support to maintain its classical music format.

Commercial radio is not an alternative to public radio in providing classical music to American listeners. In a letter to the editor of Broadcasting magazine, M. Robert Rogers, one of the original owners of WGMS-AM-FM, Washington, D.C., states that "classical music has become an ever smaller drop in the bucket of (commercial) broadcast programming," (Broadcasting, September 1, 1975, p. 16.)

One result of such events is that classical music listeners must turn increasingly to noncommercial public radio for this type of music. The Radio Music Monthly report on WHAS-FM points out that "Louis tille will not be totally left without a concert music station, as there is currently a public library station in Louisville that broadcasts some good music, and there is also a possibility of a local college starting up a classical format (noncommercial) station."

But now we face the potential Catch-22 situation of classical music disappearing from public broadcasting as well, since the burden of copyright is

threatened.

What will happen if the public stations are forced off the air or forced to stop broadcasting classical music because of the necessity of clearing performances? Listeners will then have nowhere to turn for classical music in the home except to phonograph records, which are rapidly being priced out of the reach of millions of people at \$6.95 and \$7.95 per disc.

We will discuss the reasons why public stations may be forced off the air or out of classical music broadcasting in the third section of this statement.

THE BENEFIT DERIVED BY COMPOSERS FROM PUBLIC RADIO PERFORMANCE

Public radio stations have been accused of exploiting America's creative talent because the stations do not pay performance fees. This is not so, Broadcast of

the works of composers—especially young, virtually-unknown composers—can be of material assistance to them.

Primarily there is the educational value of such broadcasts. In the non-metropolitan areas of the country, classical music lovers have no way to hear the works of contemporary composers except on public radio. There are no concerts devoted to introducing new music. The local record shops stock very little classical music, and what they do stock is mainly traditional masters that always sell well.

Local symphony orchestras play very little contemporary music because of the technical difficulties posed for the semi-professional and amateur players and—more importantly—because of audience resistance to much contemporary classical music.

Broadcasts on public radio perform two functions for the contemporary com-

First, they introduce listeners to the creative talents of the time and make them familiar with their compositions.

Second, the educative process can lead to live performances for which composers are paid and which bring them into direct touch with audiences and performers. Composer Scott Huston wrote to the Music Director of public station WGUC-FM, Cincinnati:

Our recent conversation stirred my memory with regard to the number of performances of my music that have come about from a direct or indirect result of my recorded things that have been played on FM radio, here or elsewhere. Without much prodding I can recall instantly a performance of *Phenomena* which a University of Vermont faculty member heard on New York radio, resulting in three performances of that work in Vermont and New Hampshire. Another work which was performed because the director heard it on the FM radio was my *Pro Vita*, for solo piano and brass choir. Other works which were performed as a direct result of radio hearings are the *Penta-Tholoi* and the *Sound at Night*, roughly ten other pieces were bought, rehearsed and performed at universities, festivals of contemporary music and the like, because someone heard them on the air waves.

One could always wish for more emolument, but BMI, royalties and commissions keep one pleasantly surprised, if not rich; more important to a composer is the exposure afforded by FM (non-profit) radio. Therefore, although I am not sure of the exact situation, I would tend to agree with you that non-profit stations do such yeoman service to us "serious" composers that they should not have to pay fees to any licensing organization. (Italics supplied.)

Another composer, Donald Wilson, wrote to Congressen in Delbert Latta about H.R. 2223:

As a composer, I find the radio my major source of information concerning the state of my art, namely contemporary music. As an educator, I regularly recommend specific programs to my students as they (the programs) pertain to course work. In it the capacities I would be severely distressed at the discontinuation of contemporary music broadcasting. Yet this may be the ultimate effect of H.R. 2223, for local public radio broadcasters will be forced to avoid programming copyrighted works for lack of funds.

On the other hand, as a published composer and member of one of the licensing organizations, I would doubt very much if my income would be significantly enhanced by royalties from radio broadcasts of my compositions. In other words, weighing the advantage of licensing against the disadvantages stated above, I would much prefer the exemption.

Before joining the faculty of Bowling Green University, Mr. Wilson worked in public radio for several years. Among his accomplishments was the production of an award winning, two-year series, *Tone Roads*, devoted to the work of contemporary composers, chiefly young, beginning composers. He has supplied APRS with a few quotations from correspondence he had with composers about the programs at d his use of their works on the air.

From Warren Benson: "I will send you the tapes of my large works for band that are suitable for broadcast performances. I am pleased that you are interested in using them and grateful for the exposure that they will receive" (February S, 1966). Thank you so much for the copies of the March (Program) Guide, containing the listing of my Trio for Percussion on the broadcast of March 10th. Don't worry about the individual listings; any listing at all is a pleasure" (March 31, 1966). "Again, my thanks for your interest in my music and your continued assistance to all composers with whom you come in contact" (December 12, 1966). (Emphasis supplied,)

From Charles Boone: Bill Valente suggested I write you regarding tapes we have of selected compositions from Composers' Forum concerts given during the past two years. We would be delighted if you would be interested in playing them on WUHY and will be glad to send them to you. . . . The tapes I would send you would be from our Campus Concerts Series, programs of music by young composers . . ." (December 4, 1965.)

From George Burt: "I was really delighted and flattered that you had scheduled my choral piece for the March 20 broadcast. Also, I am certainly impressed with the kind of programming you are doing . . . I have just accepted a new position at the University of Michigan and will be there starting next September. If you would be interested in obtaining tapes of pieces written by any of the composers there, please let me know as I would be happy to act as middleman." (March 28, 1967.)

Several years later, after Mr. Wilson had left the station, WUHY decided to re-run the original *Tone Roads* programs. Typical of letters received was this one from a listener:

Over a period of time (even since WUHY increased its broadcast time), I have been an avid follower of your program "Tone Roads." Admittedly, I have not liked every piece, but I have always found it interesting to hear what the contemporary trends are. It is rare that one has an opportunity to hear private tapes which are commercially unavailable. I hope that the program is not being discontinued. One of the programs that I enjoyed the most was the one which featured the works of Donald Erb, as recorded on the first edition of Opus One records. Is this a company one subscribes to? I am interested in finding out what else they have recorded and may be interested in buying some of the records. (Letter from Mrs. Rheto Smith, July 4, 1973.)

Mr. Wilson says, "Since then, we have corresponded off and on, and I have been requested to send scores of my own works for possible performance in the Philadelphia area." Throughout his correspondence with composers, he reports, "one finds joy and excitement," and he concludes, "To think that the phrase otherwise than in a transmission to the public could put an end to so much good will all over the country! What an ironic tribute to the 200th anniversary of the nation's birth!"

Two of the principal licensing societies—ASCAP and BMI—seemingly recognize the educative value of public radio broadcasts of contemporary classical music. Both are or have been connected with weekly series on National Public Radio designed to introduce contemporary composers and their works to interested listeners.

The Coordinator of Concert Activities for ASCAP, Martin Bookspan, is the host of Composers' Forum, on which composers are interviewed about their work and examples are played. This series has been on NPR for two years or longer.

Last spring there was another series produced by the American Composers' Alliance. This group has been described by one of its staff members as "subsidized" by BMI. Composers were not interviewed, but extensive background was given by the announcer.

Even the well-established composer benefits from the exposure public radio can give. For instance, many symphonic works of Aaron Copland, Roy Harris, Walter Piston, and William Schuman have never been performed in south central Pennsylvania where APRS member station WITF-FM is located, and much of the music of these leading American composers would be totally unknown in that area—Harrisburg, York, Lebanon, Lancaster—if WITF-FM did not broadcast them. Indeed, to celebrate Mr. Copland's 75th birthday anniversary in November, the Harrisburg Symphony Orchestra has been emboldened to program one of his most difficult scores, Orchestral Variations, at least in part because it and other contemporary works have been heard over WITF-FM and Harrisburg Symphony audiences are getting familiar with the sound and idiom. In addition, the Orchestra's Music Director and Conductor will be able to present a pre-concert analysis of the Orchestral Variations and other music on the program over WITF-FM. No commercial station in the area could be expected to devote 90 minutes to such a program, and WITF-FM will present it twice—three hours of air time.

THE COMPLEX OF TOUNICAL AND FINANCIAL PROBLEMS RAISED BY MUSIC PERFORM-ANCE CLEARANCE FOR PUBLIC RADIO

If copyright payment is imposed, APRS believes the public will lose a valued cultural service, the nation's young composers will lose the last remaining radio

outlet for their works and contact with their potential audience, and at least some of our public radio stations will have to close. There are four reasons why APRS believes this to be the probable outcome:

(1) The inability to determine-rights to classical music, since only one

record company consistently provides this information.

(2) Uncertainty over public domain music with the emergence of derivative or critical editions of previously public domain works.

(3) The inability of the societies to guarantee that they cover 100 percent

of the composers.

(4): The lack of station resources.

1. Inability To Determine Rights to Classical Music

In spite of the claim that "there is simply no clearance burden on public broadcasting whatsoever" made by ASCAP on page 32 of its statement to this Subcommittee on July 10, 1975, there are real and serious difficulties faced by public radio stations in clearing music for broadcast.

Contrary to what one might logically think, it is not easy to determine who is the copyright owner of a piece of music. The societies have said that the information is on the record label or record jacket. This may be true in the field of popular music, but it is most definitely not the case with classical music—a statement that can be verified by anyone in five minutes in any station's record

library.

The only record company that apparently supplies copyright information is Columbia, and even it does not do so 100 percent of the time. And it is now doing so only on copies specially processed for its monthly service to radio stations; if a station buys a record from earlier releases, there probably will be no copyright information. One of the other major companies—RCA—sometimes supplies information and sometimes does not. The other major record companies provide no useful information at all at any time. Easily 75 percent to 80 percent of the classical records in any public radio station's library will be found to

contain no copyright information.

Even where records have information, it may be contradictory. APRS meinter station WITF-FM surveyed the major symphonic works of one composer, Gustav Mahler, to see what it would face if it were clearing this music for broadcast. One result is typical of the difficulties statious face if clearance is imposed. Columbia, the company that does the only consistent job of supplying copyright information, has five different recordings of Mahler's Symphony No. 1; the information supplied with two of them says it is in the public domain; the information supplied with two others that it is copyrighted and licensed by BMI; and the information on the fifth recording says it is licensed by ASCAP. There is no information at all on the other nine recordings of this music WITF-FM consulted.

When information is given on records, it frequently is only the initials of the licensing society. This might be adequate as long as the publisher or composer does not change affiliation (although one ASCAP report requires the station to list the publisher; see below). If that happens the station does not know who the publisher was originally and cannot hope to track the changing affiliation

without personnel assigned.

Even the publishers themselves are confused or unable to answer uestions. Public radio station WMUK in Kalamazoo, Michigan, wanted to broadcast King David by Artur Horegger, but it was uncertain whether it was regarded as a dramatic work, so it contacted Belwin-Mills Publishing Corporation, which at one time cleared performances of Honegger's dramatic works. Belwin-Mills referred WMUK to the New York office of Editions Salabert, Honegger's publisher. Salabert, in turn, referred WMUK to E. C. Schirmer Music Company, Roston, which was finall, able to answer the question. This took only a month and six letters—relatively quick.

In another instance, the results took longer and left the station right back where it had started. The Music Director of WFIU-FM at Indiana University decided to try "a little experiment to see just what was involved with getting clearances." He chose Broadway show music, which involves dramatic rights which must always be cleared by the copyright holder and can never be cleared through ASCAP or BMI. Nonetheless, a BMI Vice President assured the station that it could broadcast the original cast recording of She Loves Me without

further action.

The response from ASCAP took a month and a half, but it contained the correct statement that "in order to play the original cast recordings you must

obtain permission directly from the copyright holder or agent" and gave the station the appropriate names and addresses for the works it was interested in.

One publisher informed the station that the rights it was seeking were cleared by ASCAP and available under a regular ASCAP license. Five years later the other publisher has not even been heard from at WFIU-FM.

If such confusion and misinformation exists within the licensing societies and the publishers, public radio has no hope of operating in this area "with no

clearance burden".

The licensing societies publish lists and directories of their members, but licensees receive a constant stream of corrections, additions, deletions, and other changes to be posted to the membership list. A piece of music cleared before lunch may change its status when the afternoon mail arrives. Clearly stations already straining at hopelessly inadequate budgets must hire someone to be in charge of clearance matters if they are subjected to performance fees.

2. Uncertainty from the Emergence of Critical Editions of Public Domain Works

A reasonable person might ask why stations faced with these problems would not limit their broadcasts to works in the public domain. The answer lies in the difficulty of determining what is and what is not in the public domain. The preceding section contains an example five recordings of the same Mahler symphony from the same company with radically conflicting information, and nine other recordings of the same piece with no information at all.

Here is another example: Wolfgang Mozart died in 1791; in the late 1960's stations using recordings of European concerts distributed by the Proadcasting Foundation of America were told they would have to pay a publisher \$750 for the right to broadcast some of Mozart's music first performed and published about

two hundred years ago.

The claim for payment for performance of the Mozart music was based on the fact that a German publisher had just published the music in question in a crit. Tedition; that is, an edition correcting errors in previous editions of the san winds and setting forth the changes in detail. Critical editions are protected for en its under German law and performances utilizing them have to be _1 jast like a work written yesterday.

A critical edition may be the reason for some of the conflicting information on the recordings of the Mahler symphony. But assuming this to be true, how does WITF-FM determine the status of the other recordings of the same Mahler symphony in its library? Apparently the only absolutely certain way is to hire an experienced musician and purchase a large library of printed scores and set the musician to work listening to the recordings and comparing them with the scores.

It should be noted that musical scholars are a work on critical editions of the works of a number of composers long dead and whose works have been in the public domain until now. One has an uneasy vision of ultimately having no public domain music left. This is probably an extreme never to be reached, but the spectre has enough substance and reality to prompt local public radio stations to seek protection from it in the form of the exemption APRS has proposed.

3. The Inability of the Societies to Guarantee that they cover 100 Percent of the Composers

In its statement to the Subcommittee of July 10, 1975, pp. 31-2, ASCAP says: By entering into a license agreement with each of the three major performing rights organizations, ASCAP, BMI, and SESAC, public broadcasting can be assured of performance licenses in virtually all copyrighted musical compositions. (Emphasis in original.)

The crucial word here is the adverb "virtually." It means that not all music would be cleared by such licenses. As long as it were not, each work broadcast would have to be checked to see if it is covered by the station's licenses; the confusion over the Mahler symphony cited above indicates clearly that such check-

ing is a job for an expert.

A spokesman at BMI's American Composers Alliance told the Music Director. of an APRS member station that "about one tourth" of the active composers today are not affiliated it, any way—personally or through a publisher—with

ASCAP, BMI, or SESAC.

Again quoting composer and radio broadcaster Donald Wilson: "This 'non-coverage' would include works by student composers, other young composers and even older composers who have not yet received due attention such as Richard Robinson in Atlanta (or, for that matter, Charles Ives-whose work was ignored throughout his entire creative life)." He continues:

Specifically, as an employee of WUHY-FM in Philadelphia in the mid 1960's. I broadcast a number of my works in my "Tone Roads" series that would not have been covered by licensing. Assuming that these works were copyrighted individually by their composers (or covered by statutory copyright in lieu of this), I would like to furnish you with this list of composers who were not, to the best of my knowledge, affiliated with ASCAP, BMI or SESAC at the time their music was initially broadcast on "Tone Roads" Philadelphia:

Wm. Dudley Louis Angelini Ken Stallings John Bergamo Chas. Buel Doug Leedy David Stock Richard Robinson Barbara Kolb Wm. Valente Chas. Boone Peter Winkler

Paul Zukofsky Richard Fitz Daniel Lentz Robt. Suderburg 🐒 Gerald Shapiro **Eugene Turitz** John Melby Max Schubel Phil Corner Jacob Glick Alden Jenks Don-Wilson

These were composers mostly in their twenties and either still in school or fresh out. I have refrained from listing composer, who were at that time in their thirties (such as Donald Erb and George Crumb) on the chance that they might have become affiliated as a result of an early publication of which I would not have been aware.

The point to all this is that my series, "Tone Roads"—for which WUHY-FM received a "Major" Armstrong Citation in 1966—simply could not have existed at all if I would have been required to seek copyright clearance for each of the works by unaffiliated composers that I broadcast over a two year period; either that or would have been an entirely different series limited to commercial recordings of established composers... And as for funds for help with the paper work, let alone licensing fees-well, the station was so poor that my starting salary was \$100 per week in 1965, and I had already received my doctorate in composition.

I would love to see (hear) a radio series like "Tone Roads" that would pay considerable attention to the youngest of young compars, those who are still exploring for a style of their own, but I am worried that the lack of exemption for non-profit broadcast of nondramatic musical works as stipulated by House Bill 2223 will completely destroy all hopes of such a series' coming into existence. (August 24, 1975; emphasis supplied.)

4. The Lack of Station Resources

Public radio does not now have the resources in people or money that it will need if it loses its existing non-profit exemption. Never having been subject to copyright clearance, we are uncertain of the full meaning and impact of inclusion. In spite of the claims made previously by the music industry, as we have shown above, clearance of classical music is not a straightforward and simple process. It requires expert knowledge and a great deal of time, Both are expensive.

In addition, clearance requires the filling out of forms and record keeping. One person estimated that it would cost each public radio station \$10,000 to \$20,000 a year to handle copyright clearances. This estimate may be conservative just for the administrative casts, regardless of the amount of the license fee.

Public radio does not have this kind of financial resources available. A commercial station may raise its advertising rates to cover increased costs of this kind, but public radio stations have no rates to raise to anyone.

Public radio stations do not receive large underwriting grants from Mobil Oil Corporation or Xerox Corporation or from any company or individual.

Public radio simply is not wealthy.

The avery e station has an annual budget of \$132,000 and an average staff of eight full time employles. It receives no more than \$18,700 from the Corporation for Public Broadcasting in its annual Community Service Grant. (Note that the average Community Service Grant for a public television station is larger than the total budget of the average public radio station.)

It is easy to see why an additional \$10,000 or \$20,000 per year would doom

some public radio stations to total extinction.

But extinction would not come solely from the expense. To be eligible for federal assistance, a station must meet certain criteria established by the CPB. These criteria require, among other things, that a station operate 16 hours per day, seven days per week, and 52 weeks per year. The most recent figures available show that the average CPB-qualified public radio station broadcasts classical music for 60 percent of the time it is on the air. Without relatively cost-free access to music, what will these stations broadcast? Without music, they may drop below the CPB requirements for qualification, lose the little federal dollar support they now receive, lose their NPR affiliation, and will have to go off the air.

This would be a sad fate for a public radio system launched so enthusiastically by the Congress in the Public Broadcasting Act of 1967. Instead of growing to serve all Americans as it is now doing, public radio will shrink to virtually

nothing.

Statutory Language-Performance

We have enclosed as attachment A language to be adopted as an amendment to section 110. (The inclusion of this subsection—110(9)—presumes adoption of the exemption for performances to print-handicapped audiences.)

MATTHEW B. COFFEY,

President.

Attachment.

Sincerely.

AMENDMENT TO SECTION 110

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(9) performance of a non-dramatic literary or musical work in the course of a broadcast by any licensee or permittee of a non-commercial educational radio station.

[The above inclusion of subsection 110(9) presumes adoption by the House of subsection 110(8), an exemption of performances designed for broadcast to a print-handicapped audience already approved by the Senate Copyright Subcommittee.]



COPYRIGHT LAW REVISION

THURSDAY, OCTOBER 9, 1975

House of Representatives,
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
of the Committee on the Judiciary
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m. in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, Pattison, and Rails-

back.

Also present: Herbert Fuchs, counsel; and Thomas E. Mooney, associate counsel.

Mr. Kastenmeier. The hearing will come to order.

This morning, and again on October 23, next Thursday, in this room the subcommittee will hear closing testimony from Ms. Barbara Ringer, the Register of Copyrights. Ms. Ringer has been requested and has agreed to give us a detailed review of the state of the revision project, now that the hearings have been completed. Of course, we also would observe that in the other body, the Judiciary Committee in the Senate has reported out, earlier this week, a slightly modified version of the bill. So, I think these hearings are most timely. I would expect that other members would be appearing very shortly.

In any event, it is always a pleasure to greet Barbara Ringer. I suppose we would like to hear ultimately about three things: First, the general review of the bill in its entirety—and these three things are not necessarily in this order—but we are interested in the bill, and in the sections and in the provisions, whether or not they are in controversy, or have been in controversy; second, those matters which still provoke some controversy, and we would like to pay special attention to them; and third, we would like to ask you, if you are able, to indicate how the present state of the bill in the other body may differ from the other body's action of last year, which is really encompassed in H.R. 2223, which is substantially the Senate bill of the second session of 1974.

Well, in any event, you may proceed.

TESTIMONY OF BARBARA RINGER, REGISTER OF COPYRIGHTS, LI-BRARY OF CONGRESS, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL

Ms. Ringer. I would like to start with a general statement and endeavor to answer your questions, then proceed with a general (1779)

review of the bill, and then go into some of the detailed questions, which I will continue on the 23d. I also will try to give you a general idea of what the Senate did on October 7, although I have not seen the text. I have just had the amendments described to me.

On May 7, the first day of your hearings, I appeared as one of the opening witnesses on H.R. 2223. My duty then, as I saw it, was to try to put the bill in historical perspective, to pinpoint the major issues remaining to be settled, and to answer your initial questions about the

substantive content and status of the legislation.

I am returning on the 14th day of these hearings, in response to your letter of September 9, 1975, asking me "to make the final presentation of testimony reflecting your views with respect to what the hearings revealed and what changes if any in the bill seem indicated." I am greatly honored by this request, and I will do my utmost to fulfill it in any way that will help the committee complete the formidable task now confronting it.

During my testimony on May 7, I sought to identify what I considered the main issues remaining after a decade of sporadic legislative consideration of the general revision bill. The seven principal issues, more or less in the order of importance as I saw them then were:

(1) Cable television.

(2) Library photocopying.

(3) Fair use and reproduction for educational and scholarly purposes.

(4) Public and nonprofit broadcasting.

·(5) Jukebox.

(6) Mechanical royalty for use of notice in sound recordings.

(7) Royalty for performance of records.

Related to several of these issues was the chapter of the bill establishing a Copyright Royalty Tribunal, which also presents some problems on its c ... I also mentioned the likelihood of questions arising in connection with the manufacturing clause and with various con-

cerns of graphic artists and designers.

Looking back, I think that most of the testimony you heard during the hearings actually does fall somewhere under one or another of these hearings. However, under each one of these big issues there are varying numbers of interrelated subissues, and none of them can be approached in isolation. There is, I hope you will agree, a figure in the carpet, but it is hard to find amid all the intricate strands and colors and patterns that go to make it up. I am not going to try to oversimplify something that is inherently complex, but I am going to try to organize the mass of arguments and proposals that have been put forward at these hearings in a way that will make them comprehensible in themselves and as a part of a larger whole.

With my testimony on May 7, I submitted 17 briefing papers covering various aspects of the bill. I also mentioned that I was preparing a second supplementary report of the Register of Copyrights on general revision, which I hoped to have finished in time for the subcommittee to be able to use it when it starts its markup. I have worked on this report off and on for most of the summer, seeking to incorporate into it everything that has been raised in these hearings, the changes made by the Senate subcommittee when it reported its bill

in June, and a very few, mainly technical, points that I felt I should

raise independently since no one else has mentioned them.

This supplementary report is nearing completion in draft form, and I plan to present it to the Librarian of Congress for submission to Chairman Rodino of the House Judiciary Committee and Chairman Eastland of the Senate Judiciary Committee as soon as possible. In its final form, the report will consist of about 15 chapters organized by subject matter in roughly the same order as the bill. At the beginning of each chapter the report will identify the sections involved and the issues remaining to be decided. The body of each chapter will, in varying ways depending upon the nature of the problem, review the background and content of the provisions of the bill in question and explain the nature of the issues raised and the arguments with respect to them.

The last section in each chapter will consist of comments and recommendations put forward by me as Register of Copyrights. In some cases, I will put forward alternatives or suggested possibilities for methods of compromising disputed issues. My purpose here is not to add one more burden to the already heavy load of proposals you need to consider, but to help you to find ways of deciding among the disputed proposals and debated points you already have before you. I have opinions on some of the matters before you and I will be honest about expressing them when need be, but I have no axes to grind. You, the members of this subcommittee, are the only decisionmakers in this room. My aim is not to influence you; it is to help you, in any

way I can, to do your legislative job.

During my scheduled 2 days of testimony, I will first seek to give you an overview of the bill and to show how its many parts fit together. I will then start with chapter 1 of the new title 17 of the U.S. Code, as revised by the bill, and proceed by subject matter through to the end. I am attaching to this statement the drafts of the first five chapters of the supplementary report, which I will use as the focal point of my testimony. And depending on the amount of time we have, and the way the hearing goes this morning, I will probably read some segments from that draft.

On October 23, I will uo my best to give you the draft text of the

remaining chapters.

Today, I will try to cover the following topics: (1) Subject matter of copyright. (2) Fair use and reproduction for educational and scholarly purposes. (3) Reproduction by libraries and archives. (4) General limitations on performing rights. (5) Secondary transmissions—CATV—normally known as cable television.

These topics include the three most important and difficult issues remaining in general revision. I believe that all of them are susceptible of reasonable solutions. My hope is that my testimony this morning will not only sum up the results of the hearings on these hard issues, but will also help your subcommittee succeed in finding these reasonable solutions and reporting a good bill.

Thai

Mr. MASTENMEIER. Thank you, Ms. Ringer. At this point I am chagrined to observe that there is a vote going on on the House floor, a recorded vote on the question of H.R. 7706. We will have to recess briefly. We will, I hope, be back very soon. I hope you will indulge us in this difficult task of competing with the House floor for attention. We will recess for 10 minutes. Perhaps we can come back sooner.

Recess.

Mr. Kastenmerer. The committee will come to order. You were saying, before we were so rudely interrupted?

Ms. Ringer. Thank you, Mr. Chairman. I had just finished my short opening statement. Perhaps I could give you, at this point, a brief summary of what the Senate full committee, the Judiciary Committee, did on Tuesday. I could do it later. It is a little hard to know exactly how to fit it in, Mr. Chairman. It is going to be obtrusive any time that I do it. I think perhaps now is as good a time as any.

time that I do it. I think perhaps now is as good a time as any.

One of the subjects I was going to talk about this morning was directly affected by the Senate Judiciary Committee's actions, and

only one.

Mr. Kastenmeier. Well, Ms. Ringer, use your own judgment in the matter.

Ms. Ringer. All right. To summarize the information I have—and I have seen nothing in writing, for I just have notes of the conversations—the Senate full committee completed all action and ordered the bill reported, with certain amendments. The Senate will be in recess next week, and the expectation, as I am told, is that there is no prospect of floor action until November, but there is a good possibility of it then, and that the chances of any referral to the Commerce Committee in the Senate, as happened last year, are remote.

There were three amendments to section 111 on cable television, and I think I will just skip over them, because I am going to be discussing

that today. They were just clarifying amendments.

There was an amendment effecting the liability provision of section 501(c), which, as I am told, means that the subsection which permits local broadcasters to sue as copyright owners in infringement actions under section 111, would be retained, but would be limited to cases of

willful and repeated violation.

The other amendment, which I think is the most important one with respect to cable, was in chapter 8 of the bill. I must confess that the information I have is slightly unclear as to the scope of this amendment, but at least as far as cable, and perhaps with respect to the other review activities of the ratemaking part of the tribunal is concerned, apparently the time limits, the so-called stretchout, was expanded from 6 months and 5 years to 3 years and 10 years. In other words, the review periods would be substantially increased, leaving the existing fees in effect considerably longer.

With respect to the mechanical royalty section, there was one clarifying amendment, which I don't think I need to go into. But, the most important thing was that the 3-cent rate was reduced to 2½ cents.

That was a very simple amendment.

I think the votes there were not record votes, but I canot be sure

This is informal information I was given.

Most of the substantive discussion in the Judiciary Committee was over the Mathias amendment, which, as you can recall, is not before you in the form of legislation, and was introduced only at the full committee markup session. I really don't know exactly what the language is, but, in effect, the Mathias amendment was accepted. This would set up a compulsory license for performances by a nonprofiit

public broadcasting organization. Instructional television has an exemption, but the public broadcasters, both radio and television, would have a compulsory license for performance of nondramatic literary and musical works. I gather that there were some minor amendments in favor of the copyright owners, but essentially the Mathias amendment was accepted. I am told it was pretty one sided. I was told that there were three supporters of deleting or not accepting the Mathias amendment, and that probably the other eight were in favor of it.

The Bayh amendment was not put forward. I gather Senator Bayh, who was there, indicated that he had changed his mind and was withdrawing it. This is the amendment of section 112, that would take any limit off of the number of video tape recordings that an instructional broadcaster could make and shop around. That, apparently, has been

taken out of issue, as far as the Senate is concerned.

The Judiciary Committee adopted the changes that the subcommittee had suggested in section 301, which is the section dealing with the preemption of State law. But, an additional issue, which has been raised by the Justice Department, that had not been adopted by the subcommittee, was raised in the full committee. An amendment was put forward by Senator Burdick which was accepted, and this would make the preemption of State common law not applicable to sound recordings that had been fixed before February 15, 1972. In other words, these would still be subject to protection, or whatever you want to call it, under the various State laws that had been enacted since record piracy became a big problem. This is obviously something I will address myself to in detail when we come to that chapter.

Probably the most startling thing that happened was a proposal by Senator Abourezk to shorten the copyright term. I don't know all the details of this, apparently it was not accepted, but the vote was very close. I think most people had not expected it to be an issue, so what

happened came as a surprise.

There was some discussion of a so-called ballroom operators' exemption, which has not been put before you in testimony but has been discussed in the Senate. I think you may have received some mail on it. It was voted down. This was a proposal that ballroom operators and similar entrepreneurs be freed from vicarious or related liability in the case of a situation where an independent contractor on their premises is actually choosing the music to be played. In this case, the vote was fairly one sided against the amendment.

There was a proposal to delete the entire royalty tribunal, and this was defeated by a voice vote. Apparently, this was not a widely supported amendment. I would say, of the things the Senate did, the 2½-cent matter, the stretchout, and obviously, the Mathias amendment,

were the most important amendments.

If you have any questions, I will try to answer them, but I must confess my information is sketchy.

Mr. Kastenmeier. Did they not consider the performance royalty for musicians?

Ms. RINGER. My impression is that the point was not raised or discussed at all. I did ask directly and received a direct answer, that the questions of educational exemptions and library photocopying were not raised or discussed at all.

Mr. RAHABACK. May I ask a question?

Mr. Kastenmeier. Surely.

Mr. Railsback. Well, what reason was given, or what reason ever has been given for not taking up the performance royalty in the Senate? I think there must be a reason. Is it because another committee

might take it up, or what?

Ms. Ringer. No, it is somewhat complicated, but let me try to explain it, as I understand it. Section 114 of the 1974 bill before the Senate action was the most controversial issue in the Senate last year. It was one of the reasons for the referral to the Commerce Committee of the bill for the 15-day period. And the Commerce Committee did report the bill after the 15-day referral, with some changes in section 114. When it came to the floor, the issue was very vigorously debated on the first day of the debates. And it was pretty apparent that it wasn't going to go.

And after considerable discussion, 3 days later, I believe, the Senate deleted the whole provision as far as the performing rights are concerned. There is still section 114, but the performing rights went

out.

In his final remarks in the Senate, Senator McClellan indicated that this did not preclude Senator Scott, who was the principal supporter, from reintroducing the bill as separate legislation. I have forgotten exactly how this was declared, but a statement was made publicly that Senator Scott would be expected to hold hearings on the separate legislation. In fact, in the 94th Congress, he did introduce this as separate legislation and Representative Danielson has done the same thing. This is the same bill. It is in the form of an amendment to the 1909 law.

And it was the subject of hearings in the Senate the day after you had hearing on the same subject. I believe that it is still being considered there in the context of separate legislation as an amendment of the 1909 law. One could infer that the managers of the bill, which include, obviously, Senator McClellan and Senator Scott, have agreed to deal with it as a separate problem and not put it into the discussion in the committee of the general revision bill.

Mr. RAILSBACK. Thank you.

Ms. Ringer. Do you have any other questions? All right, I will now seek to give you a very brief overview of H.R. 2223, to try to preface a much more detailed discussion of the individual sections and chapters and issues.

The earliest drafts of the bill were prepared in the Copyright Office after the study period was over. I believe that it is appropriate to go into a little detail of what was done. We did collect a mass of writings on the subject. The question of copyright revision, obviously, has a long history and has produced an enormous amount of commentary. We did go through all of this in an attempt to observe what it contained in a substantive way. More importantly, for this purpose, we got together all of the revision bills that had been introduced, going back to the 1920's, and most importantly, the product of a very major effort that had been conducted just before World War II, which produced what is known as the Shotwell bill. There was a blue-ribbon committee, chaired by James Shotwell, of the League of Nations and Columbia University fame. It had produced an excellent bill for the 1940's but it

died when the war came. I don't think that speaks to any fault in the

bill itself, but the impetus just went out of it.

We also put together, by subject, all of the foreign bills we could find that bear on this. They fall into very clearcut patterns. And we attempted to try to integrate all of this information to see how all of these different things decided or proposed to decide certain questions. We did this to make sure we weren't missing anything and to see how others have tried to fit the subject matter together in some kind of rational way.

I don't think in the end we really copied anything. We integrated and absorbed it, but I don't think there is anything in this bill now

that was ever really copied from anything else.

On the other hand, it is a curiosity to find that your bill has been adopted in some foreign countries and in some foreign treaties. In other words, we had legislated and made treaty law by this long-drawn-out legislative process. There is a certain irony to that. It is startling to see the language we are familiar with here turning up in translation in other laws.

In any case, patterns are detectible throughout the whole range of this previous effort and the effort throughout the rest of the world. These things do fall into predictable categories. I think if you go back and read our earliest drafts from 1963 and the 1964 bill, which was our first essay in this field, I think you will find the structure almost the same. There have been, of course, some additions.

Title I of the bill is the basic revision of the present title 17 of the United States Code, which is the 1909 law, as amended. That is all it

is. It does not contain anything else.

The title falls into eight general subject headings, which are the chapter headings listed on the first page of the bill. I certainly don't need to go over them for this purpose. But, this does not exhaust the

subject matter of the bill.

I might add in this connection, Mr. Chairman, that the eighth of these was added in the Senate after you finished your work on the bill in 1967. It does establish the Copyright Royalty Tribunal, which has grown in the scope of its duties since its original introduction into the bill. Originally, we had only seven chapters. And then tucked between titles I and II are a whole range of transitional and supplementary provisions which are very detailed but contain some interesting little nuggets here and there. And I will try to point them out to you, when we come to them, although I do not believe that any of them were raised in any of the testimony except that of the Government witnesses on the second day. And I will try to point those out to you when we come to them.

Then we have title II, which is a completely separate piece of legislation, namely, the Design Protection Act, which was the subject of hearings in the House and it passed the Senate three times. It passed twice separately and the third time as part of this legislation in 1974. But, it has not been integrated quite as well as it should be. It just starts out "title II" and then you have the introduction. And I think someone, and I believe it was the Department of Commerce, said that it should be integrated better, because it may not be clear in a different context, if this were enacted into law, what titles you are talking

about. And I do believe some decision should be made structurally as to how this should be handled. I don't think this is anything that need concern us deeply, but I do make that observation, because, in all candor, Mr. Chairman, the title was grafted onto this bill for strategic reasons rather than in an effort to try to enlarge the subject matter of

general revision as such.

Chapter 1 of title I covers almost all of the testimony that you heard in bulk. I would say that the vast majority of the testimony you heard is covered under chapter 1 someplace or another. In fact, the vast majority is covered between sections 106 and 116. And I do think this can be a little misleading, because the guts of the bill are not confined to those big money sections. The bill is a reform bill and it is not a bill that is intended to give people more money. It is an effort to try to bring the law up to date. In fact, I think that anyone simply reading the testimony that was given here in the first 13 days would get the impression that the issues were simply that certain interests want more money, or don't want to pay more money. That is not, basically, the issue that is presented by this bill, of course. And I believe in going through this I can convince you of this, if you are not already convinced.

Chapter 1 falls into four parts. The first section, obviously, is definitions, which I think would be wise to include at the very

beginning.

Sections 201 to 205 cover the subject matter that can and cannot be copyrighted. Section 106, which is a very fundamental provision of the bill, lays out the exclusive rights of the copyright owner in general terms. Then sections 107 to 117, are the limitations or qualifications on those exclusive rights, and inevitably, that is going to

be what is most of what we are talking about.

With respect to the definitions, these have evolved very slowly, and in some cases torturously over the legislative process, but I think that most of them are now fairly well settled. I don't recall that there was any extensive challenge to any of the language in 101. There are some separate definitions in the cable and jukebox sections, namely, sections 111 and 116, because those are the only sections in which the terms that are defined are used.

The definitions in 101 are there because they are used in more than one section. Now, this can be a little tricky, because, for example, you may look at section 105 on U.S. Government works and, for instance, say you are talking about a work of the U.S. Government, then what do you mean? Well, the definition is in 101. And it is there only because the term is used in a not terribly important way in chapter 4. And we already had a letter to the Washington Post saying that the bill is faulty because works of the U.S. Government is not defined. However, it is defined, but it is defined in section 101, and you have to look for it.

Now, some of the definitions are extremely important in connection with substantive issues, but I will try to discuss them in rela-

tion to those issues.

The subject matter of copyright, as such—the scope of the copyright law in terms of the works it covers, as distinguished from the rights it gives—is covered by sections 102 to 105.

In the report that you have before you in draft form I have singled out four issues that were raised in hearings and elsewhere in relation to these four sections. Actually, there were no issues raised in connection with section 103. I have tried to put them forward to you in the form of four questions or issues to be considered. It is hard for me to say, Mr. Chairman, how I ought to handle this. A lot of this is not of overwhelming importance. I would ask that, if you could, you would look at the questions I have put forward on that first page. I will cover the ones that I think are worth mentioning here. I would hope that you would consider them in the markup, if you don't consider them now.

I think that the main one, the one that you should consider most directly, is question No. 4, which has been raised by several witnesses for the Government, most particularly in a letter, which you may have received, from NASA. This is a section which has been very, very controversial in the past. I think that you would find the legislative history of this surprising in view of the shortness of the section and

the fact that you didn't hear more public testimony on it.

The question is essentially whether the prohibition against copyright in U.S. Government works is too broad or too narrow. It had been an inflammatory provision at one time, but I do believe that a

great deal of the heat has gone out of it.

The Commerce Department, in its testimony on the second day of hearings, called attention to the National Technical Information Service, the NTIS, which does have a statutory mandate to operate a clearinghouse for the collection and dissemination of scientific, technical, and engineering information. I would say, on the basis of my own knowledge, that most of the material they publish is not written by Government employees. It is written by independent contractors. Therefore, there is a question, initially, in my mind, as to whether or not a lot of the stuff they do publish isn't copyrightable if the Government, if the executive branch, chooses to make it subject to copyright. However, NTIS does not feel that way. And under its statutes, it is required to be as self-sustaining as possible and not to force the general public to bear the publishing costs that are essentially for private benefit for the benefit of the research and development community. The lack of copyright prevents NTIS from combating very extensive photocopyrighting. And they are mainly concerned with that, both in the United States and abroad.

The Department of Commerce therefore urged an amendment to section 105 that would allow it to secure copyright in NTIS publications, noting correctly that a precedent does exist for this in the Standard Reference Data Act involving Bureau of Standards publications.

The NASA letter, which came in not too long ago, made three specific recommendations with respect to this section. One is an old issue that in my report I attempted to cover historically, and that is to allow exceptions to the prohibition. The 1964 bill did contain a provision that would have allowed the Government to secure copyright in publications by Government employees or officials written as part of their duties in exceptional cases and under certain circumstances. This was strongly opposed, and was dropped, I believe, in the first bill that was the subject of your hearing in 1965.

Second, NASA would like to make clear that the prohibition applies only to domestic copyright protection. They argue that the rationale for denying copyright in U.S. Government publications is intended to have no effect on protection of those works abroad. If the rationale is that the public is paying for the work and therefore ought to have it free, this certainly doesn't apply to publication in foreign countries. And there is, apparently, a desire, and a very strong desire, to license foreign governments and foreign publishers to publish U.S. Government publications. Their argument is, and I am quoting, not to "require a giveaway of U.S. Government works to foreign nationals and foreign governments."

Mr. KASTENMETER. Let me just ask this, although it is a different question. Does, in fact, NASA sell these compilations or periodicals

as the U.S. Government Printing Office sells its publications?

Ms. Ringer. NASA has an extensive licensing program and does collect money, both here and abroad. NTIS is the one that is wanting the copyright in their publications domestically and internationally, too. I think that NASA's interest goes to a lot of other things besides publications, such as the badges that the astronauts were and that sort of thing. And I think that they are not seeking domestic copyright. They want the bill or the report, preferably the bill, to make clear that nothing in section 105 affects their right to license and collect royalties for foreign uses of works, publications and other things.

Third, there is in section 8 of the present law a saving clause that indicates that if private works are published by the Government, that doesn't throw them into public domain. We didn't see any real need to keep this. We felt it was self-evident, under the revised provisions, but NASA still is worried about this. And I would say on that, that the Copyright Office can't see much objection one way or the other. If

they feel it is important, then we would not object.

The Postal Service is also putting forward some proposals which have not yet been put forward officially to either House of Congress. I have summarized the gist of their proposals. They boil down to a desire to protect exclusive right in postage stamp designs. The argument is that since the Postal Service has ceased to be technically a government agency, it should be entitled to operate as a private corporation in the copyright area.

I will give you, very briefly, what I indicated in the report is our

position on some of this material, as follows:

The Copyright Office prefers to take no position on the request of the Department of Commerce for a specific exception allowing copyright in NTIS works. I feel this is strictly up to Congress.

We adhere to our position opposing a provision for setting up machinery to allow copyright in government works under exceptional

circumstances.

We agree with NASA that the copyrightability of U.S. government works in foreign countries should be made clear, but we should prefer to accomplish this in the report.

We have no real objection to retaining the aving clause now in

section 8, but we still doubt whether it is necessary.

We have no objection to a construction of statute that would treat works of the U.S. Postal Service as private publications, eligible

for copyright, but we believe that all those works, including the designs of postage stamps, should be subject to the same conditions, formalities and time limits, as other copyrightable works. In other words, we are not disagreeing essentially with the argument that since the Postal Service is now a private corporation in some respects that they should, potentially, be able to secure copyrights and exploit them and I suppose this should be expanded to postage stamps. But, I don't think this should be completely unlimited. I don't think they should be able to get an automatic copyright against the world without the use of a copyright notice and with no limitations on term and so forth. And I think that since the issue has been raised, it might be wise to include something in the report on the subject.

Mr. Chairman, the other material I have in chapter 1 is important. And I think it does deserve consideration, but I am wondering whether we should take the time of the committee on things like architectural works and this loop-hole concerning stateless persons under section 104 at this point. The expropriation question, which is now in section 104, has been moved by the Senate in the subcommittee and now in section 201. I would prefer to discuss it in the context of ownership of copyright, rather than protection of foreign works. It was really mis-

placed before, in my opinion.

Mr. Kastenmeier. In the interest of time, I think you ought to move on and we can take due note of the issues as you note them, as they arise at each point in each of the sections and chapters. And if you have not covered them, we can look at them. So, I would proceed so that we may, indeed, cover as much ground as time permits.

Ms. RINGER. Thank you, Mr. Chairman.

Chapter 2 of my report—and I would identify the issues under it as fair use and reproduction for educational and scholarly purposes—was the subject of a rather lively debate before your committee. This was, for somebody who has been through the wars on the issue, a little curious, because it was, in my opinion, somewhat difficult to identify a single educational position. I think your questioning, the subcommittee's questioning of the educational witnesses, brought this out—that there seemed to be several positions being put forward there, and they wern't necessarily consistent with each other. I think there is a pattern to them however. And, in fairness, I think that a solution to this problem can be found.

The sections that are involved are principally 107, concerning fair use and sctions 502 and 504, concerning remedies for infringement,

namely, the injunctions section and the damages section.

The issue that we are talking about now has an enormously long and difficult history. I don't think anyone can really understand the testimony that was put forward in mid-May on this without knowing something about that history. I will summarize it as briefly as I can, by saying that the educators, in the mid-1960's felt very strongly that fair use was not a sufficient guarantee with respect to classroom teaching and that obviously photocopying machines were being used extensively in day-to-day and face-to-face teaching activities. They were very concerned that broad language on fair use or the lack of any language with respect to fair use would imperil their present activities and would endanger individual teachers, and would subject them and

their superiors in the school system to the possibility of infringement suits. They felt, as they expressed to you, that the most imaginative teaching that is done involves using this whole range of new inventions that have been adapted, in some cases very ingeniuosly, for day-to-day teaching. These include, but are obviously not limited to the

photocopying machines.

There was a quite sharp confrontation in 1965 in the hearings between the authors and publishers on the one side, and the Ad Hoc Committee of Educational Organizations and Institutions on the other. And the center of the issue was section 107. The ad hoc committee was urging that it contain a more expanded language, which referred to teaching, plus a very broad educational exemption, which wasn't exactly the same as the proposal that you had put before you, but was similar in many respects. And the crux of that proposal was that if the activity was nonprofit, was for no commercial purpose of any kind, and if it was for the purpose of teaching or scholarship or research that it be allowed, without any limitations. This was combated very vigorously by the authors and publishers, as you saw in May.

A long and very difficult series of negotiations ensued. And your subcommittee played a very creative role in trying to work out a solution. Mr. Fuchs, your majority counsel, chaired a meeting which was a turning point and at which there was a considerable degree of accommodation and consensus achieved. It covered the whole range, at least as it was then viewed, of educational activities, in an effort to figure out what was fair use and what was not. The thrust of the meeting was that we will retain the fair use provision. It had been pared down to its bare essentials. But the basic compromise was to restore it and perhaps augment it a bit, especially by referring to teaching, and to include in the report a very long and detailed and explicit discussion of what the subcommittee viewed as fair use in the context of educational photocopying and other forms of classroom activity. This succeeded, and it succeeded after your hearings were finished, but the success was reflected in the Senate hearings that were going on in 1967 at exactly the same time the House passed a bill. And at that time, the ad hoc committee indicated a willingness to adhere to the agreement, if certain things were done. They had a menu of things that they wanted changed, but they weren't of a fundamental nature. Well, obviously, the Senate could not change the House report. So this was left a little bit dangling, because the Senate had had nothing to do with your subcommittee's report, which had been adopted by the full committee. That report language was obviously a major part of the compromise.

And also, there were a few things that they had asked for and that, when the Senate acted, it didn't do. They were not major, but the Senate didn't do them. They did do some of them, but not all of them.

There were, I might say, some changes in the remedies section, not the injunction section, but with respect to statutory damages that did insulate, in a sense, infringement by teachers, up to a point. It wasn't as much as the ad hoc committee asked, though.

And then the cable issue came into the picture. There was this long hiatus. And the subject was barely discussed at all during this time.

There was, as you know, a big issue over computer uses, which lapped over into the educational area. There was legislation aimed at setting up the National Commission on New Technological Uses of Copyrighted Works, which sought to deal with that. And the library photocopying issue was extremely lively in that context and in the context of the general revision bill. But, the classroom teaching question was quiescent.

But, the compromise, if that is what it was, just could not hold together that long. It was not nailed down tight enough. And meanwhile, the Williams & Wilkins case was pursing its way through the courts. In 1973, after all of these years, the Senate held a hearing which included this very issue. It had been raised again by a letter or letters that had been sent to the Senate, indicating that we, that is the ad hoc committee, were going back to our proposals for a complete exemption. They gave the reason why. And the why was essentially that they had been scared to death by the Williams & Wilkins case.

The Commissioner's report, the lowest court opinion in that case, which was in the Court of Claims and doesn't follow the usual procedure in this type thing, had been a very sweeping victory for the authors and publishers. And the educators and the classroom teachers and the higher education community had been very concerned about all this, because this was an interpretation of a fair use. The Williams & Wilkins case ran counter to what they had felt had been agreed to as the metes and bounds of fair use in the early discussions. And they were insisting either that there be an exemption, a complete exemption, or that the Williams & Wilkins case, as it then stood, be reversed by legislative process. They asked that certain further safeguards, which were similar, although not exactly the same, as the ones they had put forward in the Senate in 1967 be added to the bill. This was greeted with a certain amount of outrage, as you probably know, because they felt that, well, you make a deal but now you are going back on it. But, it wasn't that simple, Mr. Chairman. There had been a long delay.

Nevertheless, we were back, not quite to space 1, but almost. And the testimony you heard is along those lines. But, yet, if you look at the whole picture vere arefully, going back to the beginnings and trying to trace it through this agreement that sort of broke down—and the structure of the agreement still exists—and if you read the educators' testimony carefully, I believe you can see that the approach that your subcommittee took is a viable approach, if certain things are

done.

Again, I cannot do this justice, but let me give you, if you will forgive me for using the term, the bottom line of this chapter from

my statement:

The tortuous history of this provision (section 107) has finally produced a text that satisfactorily expresses the legislative intent and, as far as it goes, is acceptable to the interested parties. That is, nobody is wrangling over the wording of section 107, as such, anymore—and aside from the Department of Justice no one has suggested any changes.

The Department of Justice suggested changes that were sort of outside the area of basic issue. We therefore feel it would be unwise

and unnecessary to tinker with the language any more. We think

we've got that pretty well nailed down.

But, the clarification of legislative intent is something else again. And this is why I tried to summarize the present positions, taking into account the history and the hearings that you have held. And the summary of positions is as follows:

First: There is general agreement that, because of the importance of the problem and the lack of judicial precedent, Congress should clarify its intentions as to whether or not certain educational practices are or are not to be considered fair use, but without freezing the application of the doctrine or opening the door to widespread abuse.

In other words, you have to address this problem somehow, either

in the report or in the legislation.

Second: There are essentially two ways of accomplishing this: (1) by a detailed interpretation of fair use in the legislative report: or

(2) by an explicit statutory exemption.

Third: Following extended discussions, the authors and publishers agreed to the present wording of section 107 and to an interpretative commentary with respect to educational uses along the lines of the 1966, 1967, and 1974 legislative reports; that is, the Senate legislative reports.

In other words, and I didn't mention this in my copy here, but I suspect you know it very well, the Senate 1974 report adopted all your language, or practically all, but with some changes which probably ought to be examined. The authors and publishers have consistently

and strongly opposed any explicit educational exemption.

Fourth: Although the educators consistently favored an explicit exemption—and they never completely gave up on it, for that was always their first choice—they did agree at one point to accept the approach of a legislative interpretation of fair use on certain conditions, including the expanded wording of section 107-and that has not been accomplished—certain changes in the language of the commentary, and further insulation from liability from innocent infringement—and that goes back to chapter 5. After the first Commissioner's decision in favor of the copyright owner in the William's & Wilkins litigation, the educators returned to their proposal for an outright exemption, which clearly remains their first choice.

Mr. RAILBACK. Where is she reading from?

Ms. Ringer. I am sorry, I am reading from page 26 of chapter 2,

down at the bottom. I am going to skip around a lot, though.

However, it also appears that the position of the educators is still flexible enough for them to accept the approach of a legislative interpretation of section 107, provided it is sufficiently clear and reasonable from their point of view, and provided certain changes are made elsewhere in the bill.

We take the position—and now I am on page 27—that the proposed exemption for educational uses is much too broad. But, in any event, we seriously doubt whether satisfactory statutory language for this purpose could ever be achieved. The situation is one that really calls for the flexibility of a fair use approach, rather than the rigidity of an ·outright exemption.

At the same time—I am reading from page 27—we recognize that the interpretative language in the 1974 Schate report, consists, with

some changes, of a text prepared nearly 10 years ago by your subcommittee. Given the importance of this section and of the committee reports to an overall solution of this important problem, we recommend that the commentary be carefully reviewed and, where necessary, revised to take account of some of the criticisms leveled at particular statements or omissions.

Over the years, the educators have argued off and on, and again, to you in 1975, that under the present law they enjoy a not-for-profit exemption with respect to educational uses other than performances. And this is simply not so. The only not-for-profit exemption in the

present law applies to performances and nothing else.

But, the commercial or nonprofit character of a use, although it is not necessarily conclusive with respect to whether or not something is fair use, in combination with other factors certainly plays an important part in determining whether something is fair use; that is, if something were an infringement if it were commercial, it might not be if it were nonprofit. The motives and purposes of the use play an important role with respect to fair use decisions. I think it would certainly be appropriate to emphasize this point in the legislative commentary dealing with fair use and educational photocopying.

There was a letter to Chairman Kastenmeier, sent on August 1, 1975, which I think is worth noting here. The parties that participated in the testimony on this subject through their representatives have apparently heard your plea that they get together and see if something couldn't be worked out, and they have been meeting. I believe that you will know the results of this before you finish your work this fall. I can't guarantee it will produce much of anything, but at least the parties, thanks to you, are talking again. And I do feel this will play a role in what you say about fair use and educational copying in the final report. I won't pursue this down to the ground, Mr. Chairman, but essentially what I am arguing here is that if you go back to your original idea, which was to deal with this through a fair use section and a rather elaborate explanation in the report, and if you reexamine the language you came up with in 1967 and seek to bring it up to date and take into account some of the points that have been made, then I believe that this is a preferable approach and it is acceptable to the educators, provided certain further insulation is written into chapter 5.

Now, Professor Raskind proposed that there be no remedies other than actual damages. It seems to me that really you might as well not give any protection at all in this area. But it does seem to me that there are things you can do with respect to presumptions as to fair use in the case of individual teachers. I think there are certain further amendments you can do with respect to statutory damages, perhaps directing that if a teacher is completely innocent then statutory damages, not actual damages, but statutory damages be waived. This might be the way out of the problem. And what I am basically suggesting is the problem really, as I judge it, is not as serious and not as insoluble

as it may appear from that testimony.

Mr. RAILSBACK. Could I just ask one quick question?

Mr. Kastenmeier. Yes.

Mr. Railsback. You know, I appreciate your remarks, except you go on later to express the difficulty that is going to be encountered in having individual teachers obtain permission. And you suggested a clearinghouse. Are you going to go into that at all?

Ms. RINGER. Yes. I felt I had to address that last paragraph.
Mr. RAILSBACK. I think you are right. I think that is why they think
that not for profit has been excluded, because probably nobody has
ever enforced it.

Ms. Ringer. That is right.

Mr. Kastenmeier. At this point, I regret we have to interrupt again. We have had the second bell on a recorded vote on the floor. Accordingly, we will recess for 10 minutes, and try to reconvene one more time before lunch and see if we can complete our work. So with that, we will recess until 11:55. The committee stands in recess.

[Recess.]

Mr. Kastenmeier. The subcommittee will come to order.

The Chair will announce that we will proceed as far as we can. If we are interrupted by another vote, we will conclude today's hearing at that time. Otherwise, we will proceed for perhaps a half hour or so, covering as much ground as we can and then we will adjuorn this part of the hearing over until 2 weeks from today, until the 23d. We are in competition not only with activity on the House floor, but at least one sister committee commands the attention of a couple of our members. So, we will not protract this morning's excellent presentation. But, you may proceed.

Ms. Ringer. Actually, I had completed my presentation, effectively, on chapter 2 of this draft report. Mr. Railsback had asked a question, which I think was very germane, and I would invite other questions if

the subcommittee cares to.

Mr. Kastenmeier. If the gentleman from New York has no questions, I have no questions to present at this time on that chapter. I

would prefer that you continue.

Ms. Ringer. The next chapter is a long one and it covers the entire range of problems in section 108, which is entitled, "Limitations on Exclusive Rights: Reproduction by Libraries and Archives." But one of the themes of the chapter, which I will try to bring out this morning, is the interrelationship between section 107 on fair use and section 108, the specific library and archival exemption, and that is an extremely important underlying problem here. I think that the best way to address the problem is probably by considering the two

sections together.

The history of this legislation, as it applies to educational uses is tortuous, and I would say that the same is true with respect to library photocopying as an issue. But, in addition, it has been startlingly subject to zig-zagging. And I can only summarize the situation before the Senate consideration of the bill in the early 1970's as one of an agreement to disagree, which produced legislative inaction. The library photocopying problem has been with us for many, many years, for many decades. As I tried to bring out in my legislative history in his chapter, it was the subject of dispute between libraries and publishers back in the 1930's. It was the subject of law review articles and a provision in the Shotwell bill, which I mentioned, in the 1940's. That provision actually dealt with this problem, too. And it was the subject of something that was rather unpleasantly called a gentlemen's agreement of 1935, which mostly dealt with microfilm and particularly photostating. The dimensions of the problem were very different, of course, but the problem was there then.

And the gentlemen's agreement, as it was called, did allow a library, archive, office, museum, or similar institution owning books or periodical volumes in which copyrights still exist to make and deliver a single photographic reproduction or reduction of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purpose of research. You see, it required a written certification. It is not too clear what this agreement was. The practical experience with this agreement was that it apparently was not too successful, but it did give a certain amount of stability to this problem as long as the photocopying activities of libraries or in libraries were necessarily limited by the cost of photostats and the inconvenience of microfilm. And it is clear that this problem achieved entirely different dimens. .s, both quantatively and possibly qualitatively, when the photocopying machines came into very widespread use in libraries. And I would say that event, in terms of impact, really hadn't been fully felt even when you held hearings in 1965. I think that the practical problems have changed in dimension and perhaps in nature since then.

But, in any case, I have tried to trace the early efforts to deal with this problem in the context of revision. I think it is perhaps to the credit of my predecessors that this was recognized as a problem, and that one of the studies in our revision series back in the 1950's was devoted to this. This was really before there were so many Xerox or other photocopying machines around.

The 1961 Register's report made recommendations on this. It is very interesting to read some of these early efforts in light of the circles that we have been around on this problem. But, I will not try

te reflect them too much here, because it is too complicated.

In any case, we did attempt to get a library photocopying section in the earliest draft of the bill that was given public circulation. And it was strongly opposed by the authors and, to some extent, the publishers. The library community was not really organized in opposition, but it was getting that way when this was under consideration. And undoubtedly, the discussions that were held on that section of the preliminary draft contributed to the library community getting organized on this section. But, in fact, the reaction was somewhat inconclusive.

By the time we got to the drafting of the 1964 bill, which was the very first bill in the series that was introduced to the Congress, the issue had been drawn so sharply that there was a moment—and I remember the occasion very well—when lawyers representing the authors and publishers on the one side and the library group on the other side, agreed rather enthusiastically, but with a very bitter undertone, that we should drop the provision entirely from the bill and rely on fair use completely to deal with library photocopying.

But, because there could be no agreement as to what the library could or couldn't do in this situation, and because the agreement to drop the provision was based on entirely opposite assumptions with respect to what the present law was, we were not able even to have a

dialog on the subject in this forum.

Now there was some testimony, but it was very little and it was all in terms of what fair use might or might not provide. There was no

impetus such as that provided with respect to classroom photocopying, Mr. Chairman, to have this committee spell out what fair use meant. And all your reports in the middle 1960's said was that the parties should get together and agree what fair use is. There was also encour-

agement with respect to the setting up of a clearinghouse.

In any case, this uneasy peace was not destined to last for obvious reasons. And as photocopying devices became a great deal more common and the use of photocopying machines became much more pervasive in libraries, including small libraries, there was the impetus, spearheaded prinarily by the American Library Association—and that is where I should say, in fairness, the broadest representation of public libraries lies—an impetus to put in an exemption that would be similar to the educational classroom exemption. In other words, they wanted something that would protect individual librarians and insulate them from liability.

The impetus of the library photocopying exemption, what you have now in section 108, was protection against unwarranted liability of individual librarians. It was not an endorsement of interlibrary loan arrangements, or library networking at that time. This was lurking there in the background, but the purpose of this initiative was really to give librarians more assurances than they could have under the fair use doctrine that what they were doing on a day-to-day, more or less spontaneous and unsupervised basis, was legal under the re-

vised law.

As a result, the library community put forward an amendment to the revision bill which was the subject of considerable private discussion and was referred to in the semipublic discussions that were held with respect to the National Commission on New Technological Uses of Copyrighted Works. In fact, as part of that whole discussion, Mr. Chairman, the question of library photocopying was introduced into the mandate of the Commission. And it was obviously hoped that that would solve the problem—that is, by putting it into the Commission, then Congress, at that stage, would not have to solve the problem in a detailed way. I am, perhaps, oversimplifying and mixing the chronology of this a bit, but these things were going on simultaneously.

To make a long story short, however, late in 1969, the Senate Judiciary Subcommittee reported the bill to the full committee with a library photocopying exemption which did not go as far as the libraries wanted, but was a step in that direction and they did accept

some of the language.

The authors and publishers did not accept that amendment immediately. I think that what we see here, if you loo, at it and attempt to try to view it from a historical perspective, is this exploding technology and an effort on the part of the representatives of the people affected by it to try to maintain consistent positions in the face of the uncertainty of a revision bill. In fact, the Williams & Wilkins case had, by that time, been filed and the problem had been entered into the judicial arena.

This history was very difficult to try to summarize. But, in any case, Mr. Chairman. I will jump to August of 1973, when the Senate held hearings on this issue. At that point, the Court of Claims Commissioner had ruled—I am reading from page 13 of chapter 3—the

Court of Claims Commissioner had ruled in favor of Williams & Wilkins and the full court's reversal of that ruling had not yet occurred. The librarians proposed an amondment that was narrower than their original proposal: In effect, it would permit making one copy of a single article or contribution, or of a short excerpt without further investigation. A library could supply a single copy of an entire work after determining that it was out of print.

The previous bill, the bill on which they were testifying, had drawn no distinction at all between excerpts and single articles on the one hand and entire works on the other. And, in effect, it required that they not be available from trade sources, at all, if photocopying was

to be legal.

For their part, the authors and publishers, in general, appeared willing to accept the approach of section 108 as it then stood, which would have applied only to out-of-print and to unavailable material. They did this reluctantly and with some drafting changes. They con-

centrated their fire upon the librarians' new proposal.

Next, another zig-zag occurred. In fact, two, in fast succession. In November of 1973, the Court of Claims reversed the Commissioner and held in favor of the Government libraries in the Williams & Wilkins case. And then in April of 1974, the Senate subcommittee reported the revision bill to the full Judiciary Committee, with some striking amendments. And it is what they did, in the context of the victory of the libraries in the Williams & Wilkins case in November of 1973—that is to say, it is what the Senate Judiciary Committee did in 1974—that is really the grounds on which you heard the dispute in May.

In effect, the 1974 bill—and I am reading from page 14—accepted the librarians' 1973 proposal, but added an entirely new provision stating that "the rights of reproduction and distribution under this section do not extend to cases where the library or archives or its employee: (2) engages in the systematic reproduction or distribution of single or multiple copies." The library community greeted this new subsection (g)(2) and the explanatory commentary accompanying it with howls of outrage, arguing that its substantive contents had never been discussed at hearings or elsewhere, and that it took away

everything that the other 1974 amendment had given.

I am not sure I made this sufficiently clear, because of my skipping around, Mr. Chairman. What I mean to say is that the early 1974 amendment had drawn a distinction between excerpts and articles on the one hand, and entire works on the other. And with respect to excerpts and articles—and I mean here a real single copy, not multicopying one at a time, but a real single copy—a real single copy was permissible without much restriction. The line was drawn between full text, which still had to be out of print or not available from trade sources, in order to be photocopied. So that what they were really arguing about, which was journal articles, was, in fact, freed from restrictions on a single copy and not multicopying on a one-at-a-time basis. And the counterpart of that change was this restriction with respect to systematic reproduction, which the authors and publishers generally accepted.

They argue that, as a technical matter—I am still reading from page 14—a prohibition against systematic copying was implicit in the

rest of the section; however, the amendment allowing nearly unrestricted single copying of journal articles and similar works made an explicit prohibition against doing this on a systematic basis essential.

That was their argument and the Senate approach in 1974 accepted this. But, obviously, all of this has to be judged in the context of the

Williams & Wilkins case, which was going on at that point.

The revision bill was reported by the full Senate Judiciary Committee on July 3, 1974, and was passed by the Senate on September 9, 1974, with two changes in section 108 dealing with videotape news archives, and I - ill come to that later on. There was no debate on the fundamental issues underlying the section.

As I was mentioning earlier, there was no debate again on Tuesday in the Senate Judiciary Committee. As I mentioned, this issue has

been passed over in the Senate probably for strategic reasons.

Meanwhile, a great many of the groups and organizations involved in the dispute were filing briefs, as amicus curiae in the Williams & Wilkins case in the Supreme Court, and positions on the legislation were becoming increasingly inflexible and tenacious. During this difficut period, a dialog of sorts was reestablished, but no consensus concerning what the law ought to be and what the meaning of systematic reproduction could be achieved under those circumstances.

As we all know, the Williams & Wilkins case was argued before the Supreme Court in December 1974. In January, the two Houses, including you, Mr. Kastenmeier, introduced the revision bill with exactly the language that the Senate had adopted in 1974. And one assumed that the 1974 Senate report, which was also considered ob-

jectionable by the library community, was still applicable.

Then, in February of this year, in a spectacular anticlimax, the Supreme Court split 4 to 4 on the Williams & Wilkins case, automatically affirming the Court of Claims' decision in favor of the Government libraries, but effectively depriving that decision of any precedential weight, and wiping out any authority the Court of Claims majority opinion might otherwise have carried.

I think this was debated a little bit before you, and I am not sure it makes all that much difference, but I do feel that the judicial authority with respect to 4 to 4 affirmance makes pretty clear that this really wipes the slate clean and we are back to the beginning, as far

as judicial precedent is concerned on this issue.

We also must refer to the new National Commission on New Technological Uses, which incidentally, had its first meeting yesterday, and which does have, within its mandate, the question of photocopying, including library photocopying.

And in the 1974 Senate report, there was a passage indicating that the new Commission should give priority to this issue. Now, whether or not this is still true, in light of later developments, remains to be

seen.

My chapter 3 contains a rather extensive analysis of this section, which I included here for purpose of reference. I won't try to summarize it. But, I will come to the analysis of specific issues, which starts on page 25. As I indicated at the beginning, I do feel a very important and perhaps slightly overlooked factor here is the interrelationship between fair use and library exemption.

The strange, eventful history of library photocopying as a copyright issue has left a major question unanswered, and it can be stated three ways: (1) Are the exemptions in section 108 essentially a definitive statement of what Congress intends fair use to mean in this area of library photocopying? (2) Or, are they supplementary provisions augmenting but not restricting the present doctrine? (3) Or, could it be argued that, because section 108 says definitively that certain things can be done and others cannot, the section prohibits certain activities, that might be held fair use today?

Now, the section has a provision that supposedly interrelates to section 108(f)(2), that says that nothing in the section "in any way affects the right of fair use as provided by section 107," but this has already

been, and certainly can be, interpreted in different ways.

And I will give you one hypothetical question. Suppose, for example, that the bill were enacted in its present form and Williams & Wilkins reinstituted suit under the new law. The Court of Claims has held that what the National Library of Medicine was doing constituted fair use under the 1909 law. Would section 108 change that result? And the Senate report, the 1974 Senate report, simply doesn't give you a clue as to the answer.

I am going to skip over some of the material in the analysis here. I think I should mention that the problems have to be faced with respect to the videotape archives question, and the scope of the works covered by the exemption; namely, does music get included in or in-

cluded out?

But, let me stay with the main problem here, which is the opposition of the librarians to prohibitions, and specifically the systematic repro-

duction prohibitions.

Now, also, as you undoubtedly recognized from the startled expressions of the authors and publishers when the librarians made this point, they are also opposing the subsection dealing with one-at-a-time multiple copying, which has been in the section from its origins and hadn't been opposed before. But, it is consistent with their position, I think. Clause 1 of subparagraph (g) had been included in the librarians' original proposal to the Senate, and had apparently been accepted by everyone since its introduction into the bill in December 1969. The 1974 Senate report contains an interpretation that I think is viable, and it clearly makes the exemption inapplicable to the situation where, even if it is not systematic, what is going on is really multiple copying. The authors and publishers have constantly made the point that if you limit this to single copying, it is meaningless unless you make clear that this doesn't include making multiple copies one at a time, because that is how books are printed and photocopies are made, obviously.

In any case the crux of the issue is subsection (g) (2), which is the systematic reproduction subsection. I will now read from page 33,

which states as follows about systematic reproduction:

By far the most controversial provision of section 108 is clause (2) of subparagraph (g), and particularly its use of the undefined but inflammatory word "systematic."

This has been presented in the library community as completely taking away the exemptions (d) and (e) with respect to excerpts and

articles and full text. If it is read in its broadest scope, "systematic" might be judged that way. I think that, quite clearly, from the legislative history and from the Senate report, Mr. Chairman, that was not the intention, but the librarians are also objecting to some of the breadth of the language of the Senate report. And I do include, on pages 33 and 34, the entire text of that report, because I think you should have before you, in deciding this issue, what the Senate was saving it meant by this phrase.

Now, the opposition to this is outlined in my statement. I also think I should refer to a letter that was sent to both Chairman Rodino and Chairman Eastland from David Matthews, the new Secretary of HEW, who was obviously representing the National Library of Medicine as much as anything else in his comments. And he supported the

outright deletion of (g) (2).

But, in addition, he suggested an alternative which would amend the section to refer not only to "systematic" but also to "unlimited" reproduction, and make clear that the limitation only applies if the reproduction substantially impairs the market value of the copyrighted work. And that language, incidentally, comes from the fair use section directly.

Secretary Matthews also recommends avoiding any ambiguity in the bill by having the bill include specific definitions of systematic reproduction and fair use. And section 107, Mr. Chairman, is really

a definition of fair use, if Congress wants to go so far.

Next, there is also the unanswered question that the Commissioners of the new national commission now known as CCNTU wrestled with yesterday, which is what it is supposed to do with respect to library photocopying now that things are in their present state in the Congress.

Mr. Drinan. Mr. Chairman?

Mr. Kastenmeier. The gentleman from Massachusetts.

Mr. Drinan. Would the people who put out learned publications go along with Secretary Matthews' compromise version here? Is there any reason why the publishers of learned journals of medicine or astronomy

would say no?

Ms. Ringer. Yes, I think they could possibly say no, although I don't know. I judge this as an effort not to simply knock out the limitation but an effort to compromise it. I don't think they would accept the breadth of the language without sufficient explanation in the report, but I can't really speak for them. I think that the word unlimited is equally objectionable from their point of view to the word systematic from the librarians' point of view.

Mr. Drinan. I thought HEW might have consulted with them in-

formally in an advisory capacity.

Ms. Ringer. My impression is that they have not. This language 1 3 been floating around for a while, but I have never heard it discussed in the author and publisher community, and I don't know whether they were aware of it before Secretary Matthews' letter.

Mr. Drinan. Thank you.

Ms. RINGER. I come to the comments and recommendations on page 39. I first talk about the interrelationship between sections 107 and 108.

The librarians finally decided to seek express photocopying exemptions because the flexible and untested doctrine of fair use does not provide enough assurance that some of the things they now want to do are legal. They object strenuously to the provisions expressly limiting the scope of those exemptions, because they fear that these express limitations will also have the effect of limiting the scope of what a court might hold to be fair use today. On the other hand, authors and publishers argue that, if section 108 consists only of unlimited exemptions, they would be placed in an impossible situation. To take an extreme example, suppose that under the new law a library were providing multiple copies of entire books still in print. This is clearly not covered by the exemptions in section 108. Should the library be able to argue that, irrespective of section 108, its activities constitute fair use under section 107, and support its position with exactly the same arguments the National Library of Medicine used in the Williams & Wilkins case?

Although it has not been stated, or pe haps even perceived, in these terms, I think this is the real crux of the dispute over subsections (g) and (h). If section 108 were made to supersede the fair use doctrine completely, no limitations, such as those in (g) and (h) would be necessary; the only exemptions would be those stated in subsections (a) through (e). As long as fair use applies to library photocopying, without much more definitive legal authority as to its scope than now exists, some limitations are essential if section 108 is to settle any-

thing.

No one is arguing that the fair use doctrine should be made inapplicable to library photocopying and such an argument would be very hard to sustain. The very amorphousness of fair use provides a needed safety valve. But as long as the revision bill contains both a section 107 and a section 108, the latter must put some express limitations on the express exemptions it provides. It would be a mistake to delete subsections (g) and (h) out of hand. What is needed is a much clearer statement in the report concerning the interrelationship between sections 107 and 108, and a careful look at the wording and content of subsections (g) and (h).

Let me now skip to page 46, which deals with systematic reproduction. I have some things to say about multiple copying and the subject matter of music and pictorial and record and sculptural records. But

I will come back to that.

As indicated above in paragraph 1 of this section of chapter III, the Copyright Office believes that it would be a mistake to delete paragraph (g) completely Instead, the meaning of fair use in the context of library photocopying and section 108 must be clarified. As a part of that process, both the language of subsection (g) (2) and the commentary on it in the report should be carefully reexamined in light of the real concerns of librarians.

And I would say, in light of the proposal put forward by Secretary Matthews, that I think that is something that should be con-

sidered in this context.

A line must be drawn between legitimate interlibrary loans using photocopies instead of bound books, and prearranged understandings that result in a particular larrary agreeing to become the source of an indeterminate number of photocopies. To find that line and draw it clearly is one of the most difficult legislative tasks remaining in the revision program.

And in view of what the Senate Judiciary Committee did Tuesday, I think it is almost entirely up to you at this point, because they did not take it up and make any effort to address this problem in their

markup.

I also indicate that I think CONTU, the new National Commission on New Technological Uses of Copyrighted Works, should not be forgotten here. There are legitimate things it can do. But, at the meeting yesterday, at one point, there was a suggestion made that they shouldn't try to reinvent the wheel and that the Congress has a long history behind this provision. And I think that proposals are coming to you, and maybe already have, that you should delay action on, or you should make interim action, pending what CONTU does. And I don't argue with that, as long as you lay a groundwork for what it does. I do feel the interrelationship between 108 and the Commission should be addressed in your report. I think it is important that you get out of the Commission what you want. You created it and it should do what you want it to do, in relation to this problem.

I will come back to the question of videotape archives, which does need to be addressed in this context, Mr. Chairman. A problem arose in the context of a hassle between CBS and Vanderbilt University over the archives that Vanderbilt started building of the Walter Cronkite program. That, essentially, was the start of it. They are now doing all of the network programs, and without authority. And, as these things grow, they have started editing a little bit and they are distributing duplicates of the videotapes and so on. They are compiling some programs by subject matter, and so forth. Everything is nonprofit, but CBS sued them, and I think the case is now in coldstorage for a while. I think one of the reasons is that they are waiting to see what Congress does with this subsection. And there is a good deal I can say on this. I do have a kind of independent proposal, although it really isn't mine. But, let me just read you from page 43, which states:

At the moment, the highly publicized copyright infringement action of CBS against Vanderbilt University for unauthorized off-the-air taping of copyrighted network newscasts and distribution of the tapes, in some cases in slightly edited or compiled form, is in a state of suspension, apparently awaiting a possible agreed settlement, congressional action, or some other form of rescue. The public issues underlying the case, and the Baker amendments to section 108, are

important, difficult, fascinating, and in some ways, dangerous.

The Copyright Office cannot support the Baker amendments as they stand. They go far beyond Senator Baker's announced purpose of insulating Vanderbilt from liability under the new law and assuring it that it can continue its valuable work. The language could be construed to exempt activities that were in no way contemplated by the sponsors of the legislation, and that could open the door to completely unjustified uses.

The Copyright Office believes strongly that the fundamental problems addressed in this legislation should be dealt with by establishing, through the mandatory copyright deposit system already in the bill, a national repository of television films, including but not limited to "hard news" programs, in the Library of Congress and the National

Archives.

I might add, parenthetically here that the Library and Archives have a working agreement for the moment as to who is going to collect what in this area, and the Library will collect nonhard news and the Archives will collect hard news. The line is a little hard to draw, but I think they have worked out a satisfactory arrangement.

Mr. Kastenmeier. On this point, did not Mr. Evans testify for CBS

and did he not indicate support for such a proposal?

Ms. Ringer. Yes, and I think that he testified very clearly in support of the bill to this effect that Senator Baker had introduced last year before this exemption was put into the bill. Now, that Baker bill was not reintroduced into this Congress. On the other hand, it did provide for a Library of Congress archive. It didn't mention the National Archives in this context. But, he certainly supported the idea, wes.

Recognizing the commendable initiative Vanderbilt has taken in preserving material of great historical value that was otherwise threatened with loss, and that other institutions or individuals might be in the same situation—and I am not sure Vanderbilt is the only one doing this—there should be no objection to allowing them to con-

tinue ongoing activities, at least up to a reasonable point.

I think that Vanderbilt should not be disadvantaged by the fact that they did something that really needed doing, and I think the fact that they may have gone a little further than they should have should

not necessarily impair their activities.

I go on to state that we recommend a grandfather clause for this purpose, coupled with amendments to the current revision bill establishing a national television repository that would preserve rather than destroy fully, justified copyright protection while, at the same time, giving scholars, the public, and future generations the real benefits that Mr. Simpson and the Vanderbilt University have been seeking

to provide.

This proposal is new to the discussions of the copyright revision bill, but consideration of it, or variations of it, have been going on for several years. Our television heritage is slipping away from us, but agreements on how to save it are hard to achieve. The Baker amendment, and the testimony on it in the 1975 House hearings, reflect a bitter and unproductive controversy in which the public has been the principal loser. We believe that the best answer lies directly in the copyright revision bill, but not by means of the approach accepted by the Senate in section 108. We recommend that the Baker amendment be deleted, and that substitute amendments be drafted along the line suggested here. The Copyright Office would be proud to play a part in such a program.

The Library of Congress is in discussion of this with the National Archives and the Ford Foundation and the American Film Institute. And we believe that the copyright deposit system does offer a very

convenient, useful way of making this-

Mr. DRIMAN. If that proposal were agreed that the Library of Congress and the National Archives had this television center, would that satisfy all the purposes of the Baker amendment and would he with draw it?

Ms. Ringer. I believe so, as long as Vanderbilt itself was insulated

Mr. DRINAN. By the grandfather clause, you mean?

Ms. RINGER. Yes.

Mr. DRINAN. Thank you.

Ms. RINGER. Yes, I think so. I am answering your question as of now, but I don't know for sure.

Mr. Kastenmeier. You may proceed.

Ms. Ringer. The only other point I had regarding this chapter, Mr. Chairman, is a subject quite a few others talked around and perhaps I should mention before I come to the question of music. There is language with respect to limiting the exemption under section 108 to reproductions that are made without any purpose of direct or indirect commercial advantage and, in truth, when you look at the history of this and the language itself, it is not absolutely clear what this covers. I believe that the intention was not to exempt libraries in industrial concerns or large law firms or corporations and so forth. Obviously, it only applies to libraries and archives, but a simple collection of books could be considered an archive, too. And the limitations of the exemption do not apply only to nonprofit organizations.

In other words, it is the act that has to be nonprofit and not the organization doing it, and the Special Libraries Association, whose principal membership consists very largely of profitmaking organizations, has become concerned and wants to become included in the exemption. I don't think this was the intention originally, but I do think

you should look at this question very closely.

The next point on—if you will bear with me—

Mr. Drinan. What page are you on?

Ms. RINGER. I am looking for it; yes, page 40. Page 40 covers profit-making organizations and this language was in the librarians' own draft, as put forward in a document by the Judiciary Subcommittee in 1969. This question of interpretation had not been raised until your hearings. And the legislative history, which I laid out here on pages 41 and 42, that history is not all that conclusive.

It should be noted—and I am reading from the middle of page 42—it should be noted that, as the section is now written, it makes no difference whether the library or archive is part of a profitmaking organization; the question is whether "the reproduction is made without any purpose of direct or indirect commercial advantage." And that point

should certainly be clarified.

On the substance of the question, the Copyright Office adheres to its 1961 position. We believe that a library or archive in a profitmaking organization should not, without copyright licenses, be entitled to go beyond fair use in providing photocopies to employees engaged in furtherance of the organization's commercial enterprise. We believe that this was the meaning intended by the drafters of the language in question, and that this interpretation should be reflected in the report. But, I think this is semething that you need to debate. The implications are rather broad and much broader than the rather limited testimony that you heard on this subject.

I would say that the other issue in all of this that you will need to consider carefully is the scope of subsection (h), which was one of the

three main proposals of the library group in its testimony. The librarians recommended that it be deleted, along with all of section (g). And it does except from the exemption musical compositions, pictorial, graphic, and sculptural works, and motion pictures and other

audiovisual works.

I went through the testimony fairly carefully, and I couldn't find much discussion beyond Dr. Low's original presentation of this subject, except in the context of music. And after the hearing, there was some correspondence on this point. Rather than go into this in great detail, I will read you the conclusions that we drew on page 43, which are as follows:

Although the librarians at the 1975 hearings sought the complete deletion of subsection (h), their proposal seemed to involve music more than the other categories covered by that provision. The Copyright Office recognizes the concern of music librarians, but we believe that—with respect not only to music but also to pictorial graphic, and sculptural works, and motion pictures and other audiovisual .70rksthe needs of scholars can and should be met through fair use. It is especially important for the legislative report to make clear the relationship between sections 107 and 108(h).

I might say in this connection, I think there are cases where fair use would apply to photocopying of music and even motion pictures. The examples that were given in Dr. Low's testimony were excerpts and short passages and that sort of thing. And I could even see a situation where the motivation and the scholarly pursuit would justify, under fair use, one complete copy of, say, a drawing or a print, or something

like that.

But the exemptions that are basically in subsections (d) and (e) and (f) of section 108 were drawn without these things in mind. I think that it would probably be a mistake to go that far. I think that the report should say something about music, and the fact that for a real scholarly purpose and not for a performance, but a scholarly purpose,

photocopying music could be a fair use.

I also think, and thin is the last paragraph of this section on page 43, that some attention should be directed at a point not raised at the hearing, but which is of real concern. This is the question of pictorial and graphic works reproduced as illustrations in books, periodicals, and other literary works. No one has really made this point, but it does seem to me there probably was no intention to make some ody making a photocopy legally of a journal or article or book under section 108 (d) or (e). blank out the pictures or the tables or what have you. And I think that clearly they should be exempted, along with the larger works in which they appear as an illustration. I think this probably should require an amendment to subsection (h).

There are other points under this, but I think this probably covers

the main ones, Mr. Chairman.

Mr. Kastenmeier. Thank you, Ms. Ringer. Having concluded the first three chapters today, I think we will take due note of the hour and terminate this very productive session. We are very grateful to you. I compliment you on your presentation. You have been most helpful to this committee. I look forward to reconvening this committee

3 weeks from today, Thursday morning, October 30, at 10 in this room, where we will resume.

I yield to the gentleman from Massachusetts.

Mr. Drinan. I want to echo what the chairman said. I apclogized to Ms. Ringer earlier. I had three other committee meetings to attend. But she is a delight as a witness, because she obviously knows infinitely more about this than I do.

Ms. Ringer, I am receiving letters from all types of famous people, like Richard Rodgers, and I may actually have to send them to you. Mr. Kastenmeier. Ms. Ringer, the full text of your statement and the materials will, of course, go in the record.

The committee stands adjourned until the 30th of October.

[Whereupon, at 12:30 p.m., the subcommittee recessed, to reconvene at 10 a.m. Thursday, October 30, 1975.]

COPYRIGHT LAW REVISION

THURSDAY, OCTOBER 30, 1975

House of Representatives,
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
of the Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m. in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Pattison, Drinan, and

Railsback.

Also present: Herbert Fuchs, counsel; and Thomas E. Mooney, associate counsel.

Mr. Kastenmeier. The hearing will come to order this morning. We will hear the next-to-the-last installment of the closing testimony of Ms. Barbara Ringer in regard to copyrights. Hopefully, the next and last session will take place on Thursday, November 6.

We are fortunate, as some mornings we have not been. We have been preempted by floor business and other matters. Once again we greet you, Ms. Ringer, and if you perhaps—it might be well if you could very briefly recap what happened last time to put what we have had in context with where you shall proceed from.

TESTIMONY OF BARBARA RINGER, REGISTER OF COPYRIGHTS, LI-BRARY OF CONGRESS, ACCOMPANIED BY DOROTHY M. SCHRADER, COUNSEL

Ms. RINGER. I am Barbara Ringer, the Register of Copyrights. I am accompanied by Dorothy M. Schrader, the General Counsel of the

Copyright Office.

As I indicated in my testimony 3 weeks ago, the effort I will be making today and next Thursday is not to put forward my own suggestions with respect to the legislation, but to help you in identifying and reconciling the remaining issues in the bill.

I have prepared and am nearing completion of a second supplementary report of the Register of Copyrights on general revision of the copyright law. This report seeks to put the issues in some sort of historic perspective because, as we all know, the bill has been before the Congress for more than 10 years now.

I started last time with a very brief general summary of the entire bill trying to show its origins and its structure I then began with the problem areas that are presented to you to resolve, more or less in the

order in which they occur in the bill.

Last time I dealt first with a range of problems involving subject

matter of copyright; second, with the problem of fair use in reproduction for educational purposes; and third, of the problem of library

and archival photocopying.

This is as far as we got. I do not see much point in reviewing the rather complicated testimony I gave. It is in the record. But I will be glad to answer any remaining questions you have on those three chapters of the report, those three big areas of subject matter. I think we covered them pretty thoroughly.

With your permission, I will go on to chapter 4 then.

Mr. Kastenmeier. Please do.

Ms. RINGER. Chapter 4 of the supplementary report deals with limitations on performance rights, with the exception of those limitations dealing with nonprofit broadcasting, which I hope to get to

before the day is over.

Let me start with a very general review of section 110, which is a key section in the bill. It lays out eight specific areas in which performing rights of various sorts are limited in one way or another. I will just run them down. They are on page 3 of the chapter.

First is face-to-face teaching activities.

The second, instructional broadcasting, I will cover under what is chapter 6 of the supplementary report.

The third is performances in the course of religious services.

Fourth is live performances without commercial advantage to anyone. This was a rather complicated and at one time controversial provision that has not attracted any attention for some years.

The fifth is an important section and is one of the things I will talk about today—the mere reception of broadcasts in a public place, such as a restaurant.

The sixth was added in the Senate after you had finished with the

bill in 1967: annual agricultural and horticultural fairs.

The seventh is similarly in response to proposals put forwa. I by very special interests, public performance in connection with the sales of sheet music and records.

The eighth was added in the full Senate Judiciary Committee on October 7—for noncommercial broadcasting to the blind or deaf.

The two questions that were not raised during the hearings but are presented by this section I can I think characterize very generally as the Aiken case question, the subsection (5) question, and the ballroom question, which was presented directly to the Senate Judiciary Committee in its markup and voted upon. It was sted down. I will come to this in my explanation.

Let me talk first about subsection (5). I think it is short enough for me to read: "Communication of a transmission embodying a performance or display of work by the public reception of the transmission on a single receiving apparatus of the kind commonly used in private homes." This is exempted unless, first, a direct charge is made, or second—and this is crucial—the transmission thus received is further transmitted to the public.

You probably are unaware of this as an issue because it was not raised as such during the hearings. It has been a roiling issue in U.S.

copyright law going back to the 1930's and the early days of radio. Actually, it was known for many years as the Jewell-LaSalle question after a Supreme Court decision. As it was interpreted, the doctrine of the so-called Jewell-LaSalle case was that a copyright owner had the right to collect for the retransmission of radio broadcasts taken off the air in public places such as in the Jewell-LaSalle case itself, the private rooms of a public hotel. This was considered settled law although the decision itself left some ambiguities.

But in any case, this had seemed to settle down as an issue until just after some of these performing rights questions were discussed during your hearings. The Supreme Court on June 17 handed down a decision which, I think, requires your attention to this subsection

again.

Let me skip over the discussion in my report of this issue up to the point of the Aiken decision and review, reading from page 7, what that decision held and what it seems to mean. The Aiken case involved a fast-food chicken shop in Pittsburgh. The defendant was the owner and operator of this shop. Quoting from the decision, he had "a radio with outlets to four speakers in the ceiling," which he apparently turned and left on throughout the business day. Lacking any performing license, he was sued for copyright infringement by two ASCAP members. He lost in the District Court, won a reverse in the Third Circuit Court of Appeals, and finally prevailed, by a margin of 7 to 2, in the Supreme Court. The majority opinion was delivered by Justice Stewart; Justice Blackmun wrote an opinion disagreeing with practically everything in the majority opinion, but concurring with the result; and Chief Justice Burger wrote a blistering dissent in which Justice Douglas joined.

The Aiken decision is based squarely on the two Supreme Court decisions dealing with cable television, in both of which Justice Stewart also wrote the majority opinions. In the Fortnightly case and again in the Teleprompter case, the Supreme Court had held that a CATV operator was not "performing," within the meaning of the 1909 statute, when it picked up broadcast signals off the air and retransmitted them to subscribers by cable. The Aiken decision extends this interpretation of the scope of the 1909 statute's right of "public performance for profit" to a situation outside the CATV context and, without expressly overruling Jewell-LaSalle case, effectively deprives it of much

meaning.

For fore than 40 years, the Jewell-LaSalle rule was thought to require a business establishment to obtain copyright licenses before it could legally pick up any broadcasts off the air and retransmit them to its guests and patrons. As reinterpreted by the Aiken decision, the rule of Jewell-LaSalle apparently applies only if the broadcast being retransmitted was itself unlicensed, which is a rare situation, as you can imagine.

Justice Burger's dissent is worth quoting, I think, not only in relation to this problem, but in relation to the task before you. He says:

There can be no really satisfactory solution to the problem presented here until Congress acts in response to longstanding proposals. My primary purpose

in writing is not merely to express disagreement with the Court but to underscore what has repeatedly been stated by others as to the need for legislative action. Radio today is certainly a more commonplace and universally understood technological innovation than CATV, for example, yet we are, basically, in essentially the same awkward situation as in the past when confronted with these problems:

We must attempt to apply a statute designed for another era to a situation in which Congress has never affirmatively manifested its view concerning the

competing policy considerations involved.

Yet, the issue presented can only be resolved appropriately by the Congress; perhaps it will find the results which the Court reaches today a practical and equitable resolution, or perhaps it will find this "functional analysis" too simplistic an approach.

The reference there is to the interpretation of Justice Stewart in the Fortnightly and Teleprompter case which was carried over to Aiken. It said that, functionally, the CATV, operator or the chicken shop operator was operating as a viewer rather than as a performer or broadcaster when it retransmitted the broadcast, which was licensed.

The immediate result of this was that several people got phone calls from the press asking what would be the result under the case if it were being decided under the revised law, and the answers were conflicting. It was apparent that this had not been really thought through in these terms. The legislative history I have laid out here implied that the result would be different depending on whether or not you read the House report from 1967 or the Senate report from 1974 or particularly the Senate report that will emerge shortly, and this is obviously not a satisfactory way to leave this problem, which is too important to just pass over.

I should say the bill as reported by the Senate did not change the wording of subsection (5) at all, but I am sure the language in the report will be changed, and my impression, based on what I have been told, is that it will probably indicate that subsection (5) should be interpreted in favor of the copyright owner in the Aiken factual

situation.

Mr. Kastenmeier. May I say to members of the committee, you do not have to wait until the end of Ms. Ringer's presentation with urgent questions or points that you may want to make. Please feel free to ask it.

Mr. Drinan. Thank you, Mr. Chairman.

I just ask this question: How could they possibly expect to change the statutory language if they are going to keep (5) here, 110(5) (a) and (b)? How could they possibly change it by saying this does not apply in the Aiken situation? The language there gives the right to the

gentleman with the restaurant it seems to me.

Ms. Ringer. It is arguable. I think the language of the report your subcommittee adopted in 1967 would probably have leaned in the way you are suggesting. I do not think anyone had really thought through what is a "receiving apparatus of the kind commonly used in private homes." I am not sure what Aiken had. He had four large speakers, but they were obviously placed for reception by his customers, not by himself.

I am assuming—I do not think we need to reargue the Aiken case. Let me read you my conclusion, and perhaps that might answer your

question in some way.

Mr. Drinan. What page is this on?

Ms. Ringer. This is on pages 10 and 11. The language of section 110(5) seems adequate to express the intended scope of the exemption, and any effort to make the provision more explicit by reference to the size of the establishment, the number of patrons, the number of loud-speakers, et cetera, could freeze the provision unnecessarily and leave

unpredictable loopholes.

But it seems imperative for fresh consideration to be given to the interpretation of section 110(5) in both Senate and House reports. The commentary should provide a consistent answer to the frequently asked question: How would the Aiken case be decided under the 1975 revision bill? As things stand now, the House reports of 1966 and 1967 and the Senate report of 1974 are inconclusive, while the 1975 Senate report, now in the form of a draft before the full Senate Committee on the Judiciary, may in its final form state: "This clause is not intended to generally exempt performances or displays in commercial establishments for the benefit of customers or employees."

The main point I am trying to get across is that this should be interpreted consistently. It should not be left up in the air, as it is now.

The legislative history of section 110(5) indicates that the provision was based in part on the traditional, pre-Aiken interpretation of the Jewell-LaSalle decision, and that public communication by means other than a home receiving set or further transmission of a broadcast to the public was not intended to be exempted. The Aiken majority based its decision on a narrow construction of the word "perform" in the 1909 statute, which in turn was impelled by the earlier CATV precedents. This is what Justice Blackmun was decrying in his concurring opinion.

This basis for the decision would be completely overturned by the revision bill. It is reasonable to assume that Mr. Aiken's apparatus was not an ordinary home receiving set and that, if four speakers were necessary for proper reception by all his customers, there was a further transmission—that is, a communication "whereby images or sounds are received beyond the place from which they were sent."

This is the definition of "transmit" in the definitions section.

In other words, all—

Mr. Railsback. Where do you come down on that issue?

Ms. RINGER. I came down on the side of an interpretation that would make clear that you would be liable if the receiving set was not of the ordinary home receiving set variety, and you would not be excused by merely stringing speakers—in other words, there is a line that has to be drawn.

Mr. Railsback. You would further specify in the Senate report?

Ms. Ringer. I have not seen the final version of the marked up full-committee report. My impression is that it will come close to saying that any commercial use of music in this type of situation would be an infringement. I would not go that far. I would say the distinction is whether or not you are actually retransmitting from something that is not home-receiving apparatus. I am inclined to think that is probably what Aiken was doing.

The Court may well have been right in what it was deciding under the 1909 law and may well have been bound by the CATV precedents. There was some regret expressed. They felt themselves trapped into this because there has been licensing in areas like this, and it was a drastic thing to do to declare this long-standing interpretation of and earlier Supreme Court decision incorrect.

Mr. Railsback. So where they would use some apparatus in addition to the home receiving set, you would make that distinction?

Ms. Ringer. Of course, you have quadrophonic stereo reception now, which presumably involves four speakers. If you have four speakers, a very nice hi-fi rig behind your bar, for example, in a restaurant, and the people that are sitting at the bar get the benefit of it, I would say that would not be an infringement, but if you are stringing the speakers around the restaurant so that people in all four corners or all of the areas of the restaurant or all of the rooms of the restaurant are getting the performance, I think that was what subsection 5(b) was intended to catch, intended not to exclude from the exemption.

Mr. Kastenmeier. Is it your point of view—apparently we do not know—I read the case of course that Mr. Aiken had a home receiving set, but nonetheless strung four speakers to various parts of his es-

tablishment.

Ms. Ringer. I am not clear as to what kind of receiving set he had. Of course, some home receiving sets are very sophisticated. It may well have been something that would fall within that, but he did string four speakers to it, and it was I think recognizable as a commercial motivation rather than a simple mom-and-pop type of candy store I'll-entertain-myself-while-I'm-waiting-for-customers type of operation.

This is, of course, something that needs to be addressed in the report.

I do not think there is any necessity for amending the bill.

Mr. Drinan. Ms. Ringer, would you explain at the bottom of page 9 and 10 the proposed addition to section 501? How does that fit in with the rest of your—

Ms. Ringer. That is the next point. It is completely unrelated.

Mr. Drinan. We should just let her talk. Everything flows so well.

Ms. Ringer. This is ballroom point. It is completely unrelated. I guess there is some remote relation to the basic liability question, but essentially this was a proposal put forward on behalf of entrepreneurs who contract with independent musicians or combos, and they are not employed. It is an independent contract relationship. The performers arrive, and they unpack their material. They play. Nobody controls what they are playing, and they get back in their van and go on, and somebody from the performing rights society is in the audience, and they sue the proprietor. They consistently win in the Courts, and there was an effort in the Senate—which I believe also produced at least one letter here to your subcommittee—proposing further amendment. That would in fact be to section 501, but it is really more relevant to this subsection—that is why I put it here—which would read, at the top of page 10:

Notwithstanding any other provision of this title, the proprietor of an establishment in which nondramatic musical work is performed by or under the exclusive directions of an independent contractor, not an employee of the proprietor, is not liable for infringement with respect to such public performance.

This was put forward as an amendment offered by Senator Hruska in the Senate Judiciary Committee on October 7 and was voted down.

I would agree with that result for the reasons I give in pages 11 and 12, in which I indicate that vicarious liability I this situation is a settled principle of copyright law, that a person who violates any of the exclusive rights of the copyright owner is a infringer, including persons who can be considered related or vicarious infringers.

The case law on this suggests that to be held a related or vicarious infringer in the case of performing rights, a defendant must either actively operate or supervise the operation of the place where the performances occur or control the content of the infringing program, and he must expect commercial gain from this operation in either direct or indirect benefit from the infringing performance. This does

include the entrepreneurs of ballrooms and similar places.

There is a large and forceful body of authority upholding vicarious liability where these conditions are met. No justification exists for adopting a contradictory amendment which could create a large and dangerous loophole in the public performance right. I am quoting actually from a letter I wrote to Senator McClellan who had asked specifically for my opinion on this earlier, and I did give him my

opinion with a lot of citations which I have spared you.

Mr. Pattison. How, as a practical matter, can the owner of the establishment—let us say, let us talk about a fieldhouse at an institution, a college, how as a practical matter can that owner when he has got an independent contract agreement, and he is being very careful not to turn into an employer-employee relationship with all the liabilities that flow from it, how can he as a legal matter control the music that is played by the group that is performing?

Ms. Ringer. Admittedly, a lot of this is not handled in a very

formal manner, but of course he can indemnify himself.

Mr. Patrison. It can be part of the contract?

Ms. RINGER. Yes. Turning it around, Mr. Pattison, as these things operate practically, he may be the only person that can be found for anyone to sue.

Mr. Parcison. Which makes the indemnity not terribly valuable. Ms. Ringer. I would probably agree with that as a practical matter, but it is a balancing which the courts have been ry consistent in resolving in favor of the copyright owner.

This is not a part of the statute, but is a part of copyright case law.

Mr. Patrison. Thank you.

Ms. Ringer. This is all on chapter 4.

Now, I will go on, if I may, to the difficult problem of cable television. This is in a very fluid state. I think this is illustrated by the fact that after I wrote this, the full Senate Judiciary Committee did work its will and made a few changes. I think there has been a strategic policy decision to save some of the proposals for the House, so I think this is not as settled as some of the other issues we have been discussing.

What I mainly want to get across to you here is the enormous body of history that lies behind this provision and the complexity of the situation which involves by no means just the present law and the bill, but in addition a body of administrative regulations which have an extraordinary history of their own and ongoing activities in the

executive branch, which is continuing to work on this today.

I think I can review very briefly the history of copyright issues involving cable television under 14 headings which I have included on

pages 2 through 26 of this chapter.

Cable was not an issue until around 1963 in copy. ght because it had not yet come to have a significant commercial impact on the copyright owners' rights. I was interested to discover, when I was doing some research in Europe on performers' rights, that this secondary transmission issue had been a copyright issue before World War II with respect to radio in Switzerland where the Alps were in the way of the radio signals, and the same questions had arisen.

There are written into basically two versions of the Bern Convention provisions respecting retransmissions of copyrighted material, but in the United States the issue really did not arise until the early 1960's. The early efforts to try to deal with this were a little naive,

although I think not uncreditable.

Let me skip to the hearings that were held before your subcommittee in 1965—I discuss them briefly on page 5—which were black and white in more ways than one. The problem was put forward to your subcommittee in completely dialectical terms, the operators arguing for complete exemption, and all of the copyrights owners plus the broadcasters and sports promoters arguing for full liability. It did look very, very difficult. It looked like a very difficult problem to try to reach any sort of compromise on this.

Before your subcommittee acted, while it was marking up the bill in 1966, the Federal Communications Commission, which had backed and filled on this issue, came down with an order asserting jurisdiction over CATV systems and promulgated rules which I think almost everyone would agree amounted to a freeze. This was a system involving a very complex requirement for hearings in order to import

distant signals.

There were a number of requests for hearings. The backlog soared instantly. It was obviously not a viable way a approaching the problem, but this was the rule. During the time you were considering the bill in 1966 and 1967, the FCC had in effect frozen the importation of distant signals because you had to have a hearing, and nobody could get

through to the end of the hearing.

On October 12, 1966, and again on March 8, 1967, the House Judiciary Committee reported the general revision bill with a carefully worked out compromise provision which neither imposed full liability on cable operators nor made them completely exempt. It adopted what was known as the white, black, and gray area approach. This did not involve compulsory licensing, but it involved the white area, which was completely exempt, the black area that was completely liable, and an intermediate or gray area which was liable only if advance notice had been given that a local station had an exclusive L. onse to show the same program in the area.

This was, of course, a fairly clear-cut recognition of copyright owners' rights in this subject matter. I have to mention—although I am coming to it in a minute in more detail—that during this period, these questions were being heavily litigated, and the cases were headed for the Supreme Court. There was some support for the compromise, but more opposition, and it was obvious that the bill as it

stood had enormous communications implications, which produced an unfortunate jurisdictional dispute between the Judiciary and Commerce Committees, which got onto the floor, as I am sure the chairman remembers very well.

The result was that, in a successful effort to save the rest of the legislation, the CATV section was deleted in its entirely, and the whole

problem was sent over to the Senate.

Meanwhile, after victories in lower courts, the copyright owners lost their big copyright case in cable in the Fortnightly case in June of 1968. In fact—and I think this is sometimes forgotten—there were two decisions a week apart in the Supreme Court, both very fundamental to cable television in this country. These were the Southwestern case and the Fortnightly case. They were certainly intended to interact, but they have not done so.

The Southwestern case, which was decided first, involved two questions—I am now on page 7—first, whether the Federal Communications Commission has authority, under the Communications Act of 1934, to regulate CATV systems at all; and second, whether 1966 FCC regulations banning cable retransmission of distant signals into the 100 largest television markets under certain conditions were within

the Commission's authority.

The Court's decisions supported the FCC's authority to regulate cable television under the 1934 act and without additional legislation, as long as the actions it takes are reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. This was an opinion by Justice Harlan, and it made clear there were limits to the Commission's authority, but it pointedly declined to define what those limits are, and it specifically upheld the administrative order involved in the case as coming within the regulatory authority of the FCC.

The FCC—and this is no secret—was certainly relying on the Court to uphold copyright liability as part of its master plan. It was definitely relying on copyright to assist it in regulating cable as part of its efforts to support local over-the air broadcasting in the late 1960's. This was its policy, and it was seeking the help of the copyright

law in carrying it out.

It was therefore quite disappointed that the Supreme Court 1 week later held against copyright liability in the *Fortnightly* case, but under circumstances that left the scope of the decision somewhat

unclear. I am reading now from page 8.

The FCC in 1968 was committed to the active support of local broadcasting, particularly by independent stations on the ultra-high frequency bands, and it considered it a duty to maintain the inviolability of clearly defined geographic television arkets by preventing cable from fragmenting local sudiences at chereby causing loss of advertising revenue to the local stations. This is a flat statement. I think it is true. The FCC wanted cable to stand and bargain, and it really wanted to prevent what it called unfair competition as against local broadcasters.

The FCC was therefore as disappointed as anyone by the Fortnightly decision which held that, at least under the circumstances in the case, cable operators do not perform the programs they retransmit, and therefore do not come within the 1909 statute at all. Rejecting arguments based on the technical similarities between what broadcasters and CATV systems do, as well as arguments involving the quantitative impact of cable retransmissions, the Supreme Court adopted a functional test: a determination of the function that CATV plays in the total process of television broadcasting and reception.

In applying this test, the Court held that a CATV system operates more as a viewer than as a broadcaster in that it no more than enhances the viewer's capacity to receive the broadcaster's signals. The FCC was forced to reexamine its policies or its approaches to the problem by this decision, and it therefore tried two approaches, neither of

which proved successful.

Late in 1968, in December, it adopted a new regulation which in general effect retained the 1966 freeze, abandoned the hearing procedure entirely, and prohibited importation of any new distant signals into the 100 largest television markets, unless the broadcasting station whose signals were being picked up—and this is quoting from the regulation—"has expressly authorized the system to retransmit the program or programs on the signal extended."

Despite many protestations to the contrary, the effect of this action was actually to harden the freeze. The precondition for carrying most distant signals was the obtaining of retransmission consents. This was identified as the retransmission consent regulation, and the Commission made clear that these had to constitute express retransmission

authorization. Blanket authorizations were not sufficient.

This was virtually impossible. Cable could not get these as a practical matter. This, of course, was precisely what the Supreme Court had held was unnecessary in the Fortnightly decision, the necessity to get retransmission consent. What the FCC had done—I am expressing my own opinion, but I honestly believe that—in the guise of administrative regulation of what it called unfair competition was to impose copyright liability where the Supreme Court had held it did not exist and to create a de facto copyright protection in a situation where Congress has so far declined to act. It was hardly surprising this approach failed, so that you have the balance of the bargaining power zigging and zagging during this period. The Fortnightly decision looked like a victory for cable. Then the 1968 regulation actually deepened the freeze.

This has been the picture in this whole problem in the ensuing years up till now. In 1969 there was a significant staff agreement which brought into the picture for the first time the concept of adequate service, and I think it was mainly significant for that reason. The basic thought was that cable could carry distant signals in a market up to the point of giving the viewers in that market adequate service, which at that time was defined as three network stations and three

independents.

The tradeoff in the staff agreement, or abortive staff agreement, as it came to be known, was that CATV systems receiving broadcast programs would be prohibited generally from interconnecting for the purpose of distributing entertainment type programs. In other words, this was an agreement cable would have the right to import distant signals up to a point in exchange for a promise not to network.

This was pretty drastic stuff, even at that time. Interestingly, when this was presented to the boards of directors of the trade organizations, the proposal was accepted by the CATV operators, but was turned down by the broadcasters, who apparently felt that the proposal to outlaw CATV networking was not enough to offset the concessions

to cable and the lifting of the freeze.

Now, we return to the legislative arena and particularly the Senate which had been confronting this problem. Finally, on December 10, 1969, the Senate Judiciary Subcommittee reported the bill with some very radical revisions in the old House cable provision which had been deleted on the floor. The amended bill provided compulsory licenses for the first time for the CATV carriage of purely aural signals and local signals and signals transmitted outside any U.S. television market.

It also adopted the concept of adequate television service, this deriving from the staff agreement, providing a compulsory license for the nearest available distant signals needed to supply cable subscribers in the top 50 markets with 3 networks, 1 educational and 3 independent stations, and so forth and so on, with many refinements with respect

to markets below the top 50.

The bill contained a schedule of compulsory licensing fees based on a percentage of the CATV operator's gross receipts from subscribers and set forth detailed procedural provisions governing operation of the compulsory license. There was a provision for grandfathering, and in individual cases the Federal Communications Commission would be allowed to expand, but not to decrease the number of sta-

tions included under the bill's concept of adequate service.

The reaction to this was pretty outraged by many people, among them the FCC who felt that this infringed very deeply into their regulatory power and did not exactly coincide with their thinking on the subject. It complained particularly that it left it too inflexible. It had a plan of its own. Less than 6 months later, it adopted a second further notice of proposed rulemaking, which was the most controversial of all. It was adopted by a 4 to 3 vote. It was rather startling. It was never implemented, but it did mark a significant change in the direction of Commission policy away from the fencing in of local broadcasters against CATV competition and toward the recognition of cable television as a major communications medium.

Under the proposal, CATV operators in the largest 100 markets in the United States would be permitted to retransmit the distant signals of four independent commercial stations, plus any network signals not carried locally and an unlimited number of educational broadcast signals, on the rather startling condition that the CATV delete the commercial advertising from these signals and substitute commercials provided by local stations under a detailed scheme of priorities.

In addition, all cable systems would have been required to pay 5 percent of their gross subscription charges to the Public Broadcasting Corporation as a form of permanent subsidy for educational broadcasting. The rights of copyright owners under this scheme when the somewhat obscure, but in general the proposal appeared to preclude exclusive rights and to favor the payment of compulsory licensing fees based on a fixed percentage of gross receipts multiplied by the number of distant signals imported.

It attracted little support except from Public Broadcasting and a great deal of strong opposition, but it did provide the Commission with an opportunity to reexamine all of its basic policies concerning cable television.

Next, we come to the famous consensus agreement which was one of the important developments in 1971. The catalyst, as has been identified in the testimony before you in these hearings, was Clay J. Whitehead, then the Director of the Office of Telecommunications Policy in the White House. He did have the active collaboration and endorsement of Chairman Dean Burch of the FCC, and he sought to bring the factions into enough of an agreement to permit the Commission to go forward with the promulgation of the final regulations which, in turn, were supposed to provide the basis for copyright legislation.

There is some messy history to this, which I think I will skip over. I think I had better go into the FCC proposal that emerged about the same time. There was an initial Whitehead compromise proposal, which was followed, apparently without a lot of coordination, by a new FCC proposal—first, in the form of testimony before two Senate subcommittees, and later as a letter dated August 5, 1971, and identi-

fied as an official Commission recommendation.

This new proposal undercut the first Whitehead proposal since it completely sidestepped the copyright issue, stating that the FCC had concluded that copyright was a matter for Congress and the courts. Without any provision for copyright exclusivity—compulsory licensing, and leaving these chips to fall where they may, the Commission recommended a standard for the importation of distant signals based on three criteria; mandatory service, minimum service—that was what used to be called adequate service—and additional service. I think I will spare you the details of these, except to say that it was based on market size and the number of signals that could be imported, and it did not deal with copyright at all.

None of the special interests was enthusiastic about either the Whitehead or the new FCC proposal. The cable operators were reluctant to accept the Whitehead plan with its copyright restrictions since it was less generous to them than the FCC package, and the broadcaster-copyright interests opposed the FCC plan since it failed to protect them affirmatively. Some very hard bargaining ensued, as you light imagine behind closed doors, but with a good deal getting it. I the

trade press.

On November 2, 1971—this was the gun-at-the-head day, as it was called by the cable operators—the Whitehead compromise was put forward with an endorsement by Burch and with the request that it would either be accepted or rejected by November 11. In its bare essentials, this new compromise proposed to accept the FCC formula with respect to distant signals, but with added provisions for limited exclusivity to be written into the FCC regulations, and with a commitment on the part of all parties to the compromise to support separate copyright legislation providing for compulsory licensing and exclusivity under varying circumstances.

The consensus agreement was accepted, but there was a noticeable lack of enthusiasm. There were dissenters, and there was a good deal

said to the effect that this is a package and can only be accepted as a

package. If anything goes, the whole thing goes.

I have included the full text of the consensus agreement on pages 19 and 20 of the chapter and also the exchange of letters between Dean Burch and Senator McClellan, which I think bear on this. As Professor Botein says, and I quote on page 22: "At the end of 1971, the Commission was thus in the rather anomalous position of having one suspended set of rules, two discredited sets of proposed rules, and one

informally announced proposal."

What came out of it was none of those. What came out of it was the definitive cable television report and order of February 2, 1972, which was 500 pages long and which consisted in very general terms of the August 1971 FCC plan drastically modified by the consensus agreement to provide for the protection of exclusive rights in programs carried by distant signals. The 3-year freeze on distant-signal importation had been lifted, but because of the rule's copyright provisions, the thaw was more theoretical than real in a number of important situations.

Again, as Botein has said: "What the Commission gave in terms of

distant signals, it took away in the name of exclusivity."

As to the right of cable systems to carry distant signals, the FCC retained unchanged its general scheme of mandatory service, minimum service, and additional service as already outlined. As to the issue of copyright exclusivity, there are two parts, and I do not think I have it in me to try to get into this now, unless you want to ask me questions about it. Essentially it is nonduplication of network programs and exclusivity of syndicated programs—that is, nonnetwork programs sold in more than one market—with a distinction between markets 1 to 50, markets 51 to 100, and other markets, where there is no exclusivity.

There is exclusivity of differing types for syndicated programs,

depending on whether the market is a 1 to 50 or 51 to 100.

The February 1972 regulations are a far cry from the FCC's earlier conclusion, announced publicly less than 6 months before, that protection of exclusive right should be left to Congress and the courts. The reason for this change is found in the copyright exclusivity provisions of the consensus agreement. That is clear from the surrounding circumstances and from Chairman Burch's letter.

However, the full impact of the 1972 regulations is only now beginning to be felt because of their broad grandfathering provisions, which were also based on the 1971 consensus agreement. Some relatively minor changes have been made in the 1972 rules, but as time goes on, their practical imposition of copyright exclusivity on more

and more CATV operations seems certain to be felt.

The response of Chairman McClellan to this was favorable but not an outright acceptance. He announced in June of 1972 that in view of the FCC's definitive action, he anticipated that the congressional action on the bill would get moving again, and he warned that the CATV provision in his 1971 bill, which was the old one that had all the communications stuff in it, would have to be modified because some of the regulatory provisions were now covered by the FCC rules.

He introduced the bill again on March 26, 1973, and without any change in the cable provisions. Then, interest focused on the *Teleprompter* case which was making its way through the courts. Many people felt quite correctly that it was unlikely that there would be any congressional action until that case was decided one way or the other.

A hearing was held in the Senate in August of 1973—bear in mind, this was on the old version that had all the regulatory provisions in it. The hearing was limited to the schedule of fees, the basis on which the fees should be computed, and the fees themselves. There was extensive testimony and documentation.

It was apparent by the time that hearing was held that the provision of the consensus agreement calling for arbitration if a schedule of fees could not be arrived at by negotiation had completely broken

down.

Early in 1974, the Supreme Court handed down the Teleprompter decision, which as we all know, expanded the Fortnightly decision in favor of cable systems to cover distant signals and made clear that other cable activities such as origination and commercials and networking were not to be considered as changing their lack of liability under the 1909 law. In 1974, the bill took off again—I think I testified to this before—as a result of the Teleprompter decision.

The bill immediately resumed its momentum, and on April 9, 1974, the Senate Judiciary Subcommittee reported the bill to the full committee with certain amendments, including radical changes in

section 111.

Further changes were made when the bill was reported by the full committee on July 3, 1974, and still further amendments were added when the bill passed the Senate in September of 1974, as I think you have already heard. The cable provisions were one of the reasons that the Commerce Committee in the Senate asked for jurisdiction over the bill, asked for a referral, which it was granted, but the changes that it proposed were not major.

Actually, the cable issue in the Senate revolved around the sports blackout provision which I do not think is the issue it once was.

This is the history as best I can give it to you. Now, as I have already indicated, there have been some further changes by the full Senate Judiciary Committee, which I will come to in my detailed summary of issues.

summary of issues.

If you would like, Mr. Chairman, I will give you a very brief summary of the provisions of section 111, which is enormously long and complicated, but I think it could be summarized rather simply.

Mr. Kastenmeier. Thank you. I think we would like to have such a

summary.

Ms. Ringer. First, as to the scope of the provision: it deals with all kinds of secondary transmissions, which usually means picking up electrical energy signals, broadcast signals, off the air and retransmitting them simultaneously by one means or the other—usually cable but sometimes other communication channels, like microwave and apparently laser beam transmissions that are on the drawing boards if not in actual operation.

The section normally does not cover situations where someone tapes a program off the air, and the program is later retransmitted by tape. However, as we know, there is a complicated exception involving cable systems outside the continental United States, some of which are allowed to use tape because they cannot pick signals out of the air. There have been some further changes on that in recent weeks, which I will

get into.

Second, exceptions: some types of secondary transmissions are completely exempted from liability. These include rooftop antennas on apartments and hotels, wired instructional systems, common carriers who do nothing but send a signal on, and nonprofit boosters and translators. These are systems like an operation at an Army base where the installation has an antenna and sends signals on to special equipment in quarters and so forth. Ordinary commercial cable systems are not exempted.

There is full copyright liability when a system is transmitting to a controlled group, such as pay-TV, closed-circuit telecasts to theaters,

and music services such as Muzak.

Now, we come to the compulsory license for cable systems, which is the guts of the section. As long as a CATV operator is authorized by his FCC license to carry a particular signal, he is entitled to rely on a "compulsory license" with respect to the copyrighted material carried by the signal. In other words, if he registers his system with the Copyright Office and pays a blanket fee Losed on a percentage of his gross, he is automatically licensed to carry copyrighted material as long as he complies with the FCC rules.

As I have tried to show, the FCC rules do restrict him as to what he can carry and restrict him for reasons that are basically copyright

reasons.

The fee schedule is a quarterly one. This can sometimes be misleading because the figures in the bill are quarterly and not annual. They are half of what they were before 1974. The Senate full committee in 1974 simply cut the fees in half. They represent a sliding scale running from a half percent of gross up ot \$40,000 or running up to

 $2\frac{1}{2}$ percent of a gross over \$160,000.

A procedure is established for distributing compulsory licensing fees to copyright owners through the Copyright Office, and a tribunal is set up to settle disputes over fees and to readjust the royalty rates periodically. A readjustment can be vetoed by either House of Congress. On page 28 I try to epitomize this section as follows: a cable system does not have to worry about copyright liability for a particular program if all the signals he is carrying comply with the FCC regulations and he pays a set fee into the Copyright Office every 3 months. I think that is the gist of the section.

I have tried to single out from the testimony that was given to you on the 2 days of hearings that you had on this subject the issues that are presented. Without running over all the arguments, which change with the shifting issues, I have tried to present them in the form of issues and make comments and recommendations on them. Because this is so fluid, some things have changed since I wrote this chapter.

I will have to augment what I have actually written.

The first issue, as I see it, is whether or not there should be any copyright liability or obligation to pay royalties for secondary transmissions, mainly cable systems—that is what we are talking about here. The Office's position on this is the same as it has been. We remain convinced in general that when it imports distant signals, the cable system is adversely affecting the market for and value of copyrighted works and should pay a reasonable royalty. We consider the present bill in its overall approach as a satisfactory solution to the problem.

The arguments that were made here to the effect that a copyright owner is actually benefited by the importation of distant signals into a market that he has not licensed may have a little more validity than some people are willing to concede. Because this has been dragging on so long. I believe that some advertising agencies have begun, on a modest scale, to change their manner of doing business.

Formerly, a lot of advertising campaigns were based on very strict geographic planning. If distant signals took your advertising into another market, even if you had a nationwide product, it was not going to do you a bit of good because you were not interested in advertising in that market.

Because of what has been happening there may be some feeling on the part of program suppliers that, if they are not going to get any copyright royalties out of cable retransmissions, they might as well sell their programs in a way that they get paid for the importation

of distant signals by the advertiser.

This may have been happening a little bit, but I honestly cannot see the validity in principle of an argument that says something that is being based on a division of geographic markets is not hurt when those geographic markets are interfered with. It just does not make any sense to me, and it does not make any sense at all when you have got local products or clearly confined local advertising situations. And obviously it does not make any sense at all if you are not advertising or where the payment is based on something other than advertising.

I do believe that there is a validity to the distinction between local signals and distant signals. I will come to this point later in the

recommendations on issues.

The question of boosters and translators was expected to be raised in the Senate Judiciary Committee, and I am not sure whether it was mentioned or not. In any case, no amendment was accepted, and ap-

parently none was voted on.

At the time when we were first drafting on this bill, there was pressure both from the Government because of cable installations at some Army bases, and from some western booster and translator operators who had actually set up systems as a service to their community and were not getting any commercial advantage out of it. They were arguing for an outright exemption because they are not in the same league as the CATV. You heard testimony to the effect that these should not be put in the competitive situation with commercial CATV.

The Copyright Office was apparently responsible for putting this in the bill originally as a result of proposals that we received. They have been in the bill since 1965 and have not been the subject of any debute since then. We can see a rationale for them being exempted. We could then, and we can now, but in the absence of additional support for the exemption we would have no objection to its deletion. I do not know whether this is a real issue or whether it is somebody's idea that commercial cable systems should not be put in a disadvantageous competitive situation with nonprofit systems doing the same thing.

There were proposals with respect to technical changes in subsections (a) (3) and (b) to insure against unwarranted liability of cable systems in cases where carriage is mandatory under the FCC rules. These were to insure that cable is not subjected to complete liability, uninsulated copyright liability for infringement for things the FCC requires it to do. I do not think anyone can argue against this in principle, but I do have some questions about the language that has been used.

The Won Pat amendment, upon which you heard testimony from Representative Won Pat and others, has a long history. It is a very complicated matter. Essentially, as Father Drinan said, the question of nonsimultaneous secondary transmissions in noncontiguous areas can now be referred to as a nonproblem. We now have a letter from Senator Stevens, who is the original author of the amendment in the Senate, and it is apparently near settlement. The gist of the amendment, as it now exists and has apparently been agreed to, would be to allow taping and retransmission from tape in areas like Guam and Alaska but under rather restricted circumstances that bar against abuse of the tape. One of the circumstances is the shopping of a tape around among various cable systems in a noncontiguous area. Senator Stevens points out in his letter to you, Mr. Kastenmeier, that this will not work in Alaska because they have to do what they call bicycling. The visual image that bicycling video tape around in Alaska conjures up is an interesting one, but be that as it may, the point is essentially technical.

I think that the essence of an agreement is there, and I do not think that anyone can really argue with the principle, but I would certainly hope that some way could be found to reduce three very complicated pages of prose that are proposed to be added to an already extremely long and complicated section, that the way could be found to shorten them somehow. I would hope that counsel and the interested parties could get together and find a way.

Now the question of local signals. The Justice Department did testify on the second day of your hearings that a distinction should be drawn between local and distant signals. The Copyright Office agrees with this in principle, but we recognize—I am reading now from page 29—the practical difficulties in finding an equitable way to draw the line, and we have no trouble in accepting the graduated scale approach

of the bill.

I believe you heard testimony from the representative of the National Cable Television Association that efforts had been made in their hoard to try to find a formula to make a distinction between local and distant signals, and that they have been unsuccessful in finding a formula that satisfied the various kinds of cable systems that were represented. This apparently has been the experience in the Senate, and I do not argue with it.

I will, at the end of this prepared statement, make some comments about the Teleprompter proposal of which I am sure you have heard

in the last week which does attempt to draw that line, but I am saying, at this point, that if a line can be drawn, fine, but I have no trouble with the formula in the bill either.

We take no position on the fee schedule. I do not think anyone has any economic data that can support this on a practical basis, and lacking any basis for an opinion, we cannot comment on the fairness of these amounts.

As to the Royalty Tribunal, the idea for a Royalty Tribunal did not originate with the Copyright Office, and we do have some questions about the details of its operation. I will try to cover these in a separate chapter of this report dealing exclusively with chapter 8 of the bill which deals with the Royalty Tribunal and which contains some things which I think need your attention.

The Royalty Tribunal was the child of the cable problem. It was devised to meet the cable problem. It has now expanded its purpose. But we do think that, in principle, it is a welcome effort to help settle controversies over the distribution of royalties paid under the various compulsory licensing systems in the bill. In fact, it has been embraced enthusiastically by some of the payors and payees under some other compulsory licensing systems.

With respect to the rather powerful role assigned to the Tribunal in connection with various rate adjustments, we can see arguments on both sides. We recognize that the Tribunal could be more effective than congressional committees in marshaling and evaluating masses of economic data necessary for certain purposes and that safeguards are provided in the form of a congressional veto power.

With respect specifically to the cable television royalty schedule, we do not favor giving the Tribunal power to change the base on which these fees are computed. In our opinion, this is a legislative function that should not be delegated. I would stick with that statement, Mr. Chairman, but I think I should add something to my report because those who have read it have discussed this position with me.

The argument in favor of allowing the Tribunal to adjust the basis for the rate as well as the rate itself is that the future of cable is unpredictable and that it might be possible for a system to make its primary profits or income from functions completely unrelated to its subscription service, and that by one device or another, it might be able to reduce the amount, the gross amount received from subscribers for the reception of retransmitted signals, to a point that would be unjust to the copyright owner. This is the argument.

The opposing argument is that the Tribunal, under this provision, which is in chapter 8, could have the power, in effect, to charge twice for the same performance, the old argument. We have some reservations about giving the Tribunal this power in as raw a form as this. On the other hand, I think this is something you should consider carefully, and you will, I am quite sure, receive additional letters on this subject because it has now become an issue.

I would add that the Senate Judiciary Committee did not change

the bill on this point.

The next paragraph deals with the so-called stretchout which has become a focal point of this whole dispute. I would first say that the bill contains specific dates like January 1, 1977, as the date of coming

into effect, and July 1, 1977, as the date—this is the bill you have in front of you—as the date when the Royalty Tribunal is supposed to begin its review of the rates. These dates, of course, are unrealistic. If you pass the bill this year, they might not be, but you are not likely to pass the bill this year so that I think it can be a little confusing.

As I read the bill, as it stands in front of you, it would probably be amended to come into effect on January 1, 1978, and the bill would require that 6 months later, the Royalty Tribunal begin its review of the rate. In the Senate Judiciary Committee, the date for Tribunal review was changed to January 1, 1980, which I assume was intended to be 3 years from January 1, 1977, the effective date in the bill. This was what I was told, that the initial review would start, under the Thurmond amendment, 3 years from the effective date of the bill.

Then there would be a new review begun 10 years following that, and at 10-year intervals thereafter. These dates are the beginning of

the review, not the completion of the review.

We take no position as to whether the Tribunal should have the power, as provided in the bill, to adjust the amounts of the fees every 5 years. We are particularly troubled about the uncertain procedural situation that might result if the Tribunal's determination were, in fact, rejected by Congress. We believe that the initial review period is much too short, and we question whether 5-year intervals are long enough to do the thorough exploration of long-range economic trends and changes in industry, communications, and business practices. We are also aware that, unlike the flat amount of the royalty in section 115—that is, the 3-cent royalty—the graduated scale in section 111 includes a built-in adjustment for inflation because it is a percentage and also sliding.

At the same time, we can understand Congress' unwillingness to assume the sole duty of making a de novo review of copyright royalty rates. We also recognize that the amounts now in section 111 were decided upon without a thorough economic analysis, and may prove unfair to one side or the other. If Congress should wish to change the present bill without taking cable out from under the Tribunal altogether, it would consider several alternatives, including: (1) A one-time review by the Tribunal, after a long-enough period for the study to be meaningful, a one-shot approach; (2) a specific percentage limit on the amount the fees could be increased by the Tribunal on a particular occasion; or (3) a provision requiring the Tribunal to make the studies contemplated in the bill, but mandating it to report its findings and recommendations to Congress rather than making the determination itself.

To summarize up to this point, we are in favor of some stretchout, and while we recognize the advantage of Tribunal review and certainly have no objection if this is Congress' will, there might be other possibilities of dealing with the cable problem. I have laid out three here. The stretchout that was provided in the Senate, which is three and ten, has to be viewed in terms of a little history which has not been referred to here. There was, I think, some agreement, unrecorded and unwritten perhaps. At the time that these fees were cut in half in 1974, there was, I believe, an understanding that the fees would be immediately reviewed as soon as the bill came into effect because of the fact

they were considered so low and unfair by the copyright owners.

The position I am taking with respect to the initial review has nothing to do with that. It is simply that I do not think that that quick a review could be sustained administratively. This is a bureaucratic reason, but it is a very real one. I think that to start up an undertaking of this magnitude from scratch in a 6-month period is asking more than should be asked and would probably not produce a very effective result.

I am in favor of allowing the system to operate long enough for the Tribunal to have something to study. In other words I am not at all sure it would be able to come up with anything more meaningful than the results in the bill, unless it had time to do it. For that reason, I am not at all adverse to having the 3 years that are provided in the Senate version. The 10 years may be rather long. They are now talking about 7.

There has been some mention of the probability that some of the members who voted for that amendment were not fully aware that this

was forever, 10-year intervals forever.

In other words, as we have seen, this is a very fluid situation, and if the FCC, for example, changed its rules, which is entirely possible, there might very well be something that needed studying sooner than 10 years.

As far as the Tribunal itself is concerned, I think I will leave it at the positions that are expressed here, although I would say on the whole that I think some sort of Tribunal review in this area is probably

desirable.

The National Cable Tele ision Association has proposed that, instead of exempting local signals, the bill exempt the first \$25,000 in subscription system fees collected by a system from computation of copyright royalties. Variations of this proposal have been put forward from time to time in the past. We have no objection if Congress chooses

to accept this proposal, nor do we affirmatively favor it.

I believe that there have been and continue to be proposals to let little systems out comehow, and this is probably as good a way as any. The other possibility that has been discussed over the years is to exempt systems up to a certain number of subscribers, and I do not see any opposition to this in principle. On the other hand, it is true that the fact that the scale of fees in the bill is a sliding one and is a half percent up to \$40,000—

Mr. Kastenmeier. On that point, some questions have been raised. If one exempted the first \$25,000, the first \$40,000, how that might apply; that is, would it apply to a large system such as Teleprompter, which operates in a number of so-called local systems, that is, each being exempted—it would be \$25,000 or whatever number of thousand dollars it is—or whether it would apply to the prior conglomerate system

rather than each single operating system within the system.

Ms. Ringer. I think it would clearly have to apply to the entire system, and it would require a formula to accomplish this, but it would be very hard to defend a large system that had a number of different branches being completely exempted because each of the branches were small. I am not sure anyone is arguing that. They are arguing other things, but not necessarily that.

I take your point, Mr. Chairman; I agree with you.

I have one page to go.

An important element of the cable issue is section 501(c), which in my opinion, is not really necessary. It was part of the consensus agreement, and it spells out that for a secondary transmission by a cable system, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work, shall for purposes of subsection (d) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

I do not disagree with the principle of this, but I do not really think it is necessary because copyright under this bill is made completely divisible, and if you are the holder of an exclusive license for a particular geographic area, as a local broadcaster, you have the copyright-for the purpose of maintaining suit. I believe that the reason this was included in the consensus agreement and the reason it has been a controversial issue is perhaps based in part on the experience with the old retransmission consent FCC regulation, which, under the present copyright law, produced the argument that a local broadcaster did not have a copyright and so could not give consent as to rights it did not have.

I think this would probably be different under the present bill. Broadcasters are extremely anxious to preserve this condition. There was an amendment, not in 501, but in 111 in the Senate, which I am not sure accomplishes the desired result. It is in subsection (c), clause 2, which says that the willful or repeated secondary transmission to the public by a cable system is actionable as an act of infringement, and so forth.

The feeling was that this would insulate a cable system from liability, as against a local broadcaster. I think they are talking about harassment if there was a one-shot negligent or mistaken carriage of a signal that was not authorized by the FCC. But if they could prove it was willful or repeated, then this would be fully actionable as a copyright infringement by the local broadcaster.

I think this is probably acceptable as a principle. But I have technical questions about whether this is the way to accomplish it. I think that you as a committee should consider both the policy involved and

the technical method of accomplishing it.

With your permission, I am going to skip quickly over what was a rather major issue before you—organized sports. This has been with us since 1965.

The sport entrepreneurs that have come forward have differed from time to time. But essentially, they are still trying to preserve exclusivity and gate receipts. It was striking, at one point in a Senate version of the bill, to see all copyright material subject to compulsory licensing, except organized sporting events, which were subject to complete exclusivity. I am not sure this can be defended on policy grounds, although I think the practical problems of sports are undoubtedly real. They are certainly real to them. A compulsory license does not help their gate receipts.

And yet, if you are going to have a compulsory license as the basis for section 111, it does look peculiar and discriminatory to single sports

out as the sole subject of copyright that is entitled to exclusive rights. This did fall by the wayside in the Senate in 1974. It was rather vigorously debated on the floor, and was dropped completely and was not really revived in the markup earlier this month. I may be wrong, but I would suggest as a hypothesis that this may have passed as a major issue.

I think you obviously need to consider the arguments that were put forward. But I do not think that sports exclusivity is really part of

the package as it now stands.

Finally, an important issue which I hope my long exegesis on this will have been made clear to you—the relationship between the FCC regulations and copyright. In the absence of court decisions of legislation, and in furtherance of national communications policy from its viewpoint, which is partly that of the House and Senate Commerce Committee, the FCC has promulgated rules protecting the rights of copyright owners. We did not advocate congressional action to abrogate those rules as inconsistent with Federal copyright policy, and I do not believe this was ever really suggested, although it may have been hinted at.

We also tend to doubt whether an attack on the exclusivity rules would succeed on constitutional grounds. I think the argument could be made, but I doubt if it would succeed. However, we do very seriously question the wisdom of administrative rules giving copyright protection in cases where either the courts or Congress have chosen to withhold it. At the very least, we believe the Commission should carefully reconsider its 1972 exclusivity rules as soon as the revision bill has been enacted. In other words, we think there is some merit in the argument that cable operators make that the bill should not require them to pay for the carriage of signals which they must black out, or which they are not able to carry at all. I do think that the FCC should be abjured if possible to take another look at its rules, at the very least, in the light of the creation of copyright liability, if that is your decision.

The Teleprompter Corp. has put forward formally, I gather a proposal which does come very late in the game that would restructure the royalty rate bases, and the method for collecting and distributing the money, the method for computing the rates. And they are, I think, attacking the Royalty Tribunal in principle; they prefer to take the Royalty Tribunal out of this, although I do not think that is the essential issue. As I read their proposal, it would cover only distant signals, and would not cover any network signals, and would compute the fees based on a formula that is intended to reflect the actual nonnetwork signals that are being carried, and to identify what they would be worth if they were off-the-air television signals.

In other words, the formula would be an attempt to approximate, on the basis of trade statistics, what the value of a broadcast signal

is, based on counties.

Mr. Kastenmeier. Is that proposal, has it been advanced in Senate

deliberations?

Ms. Ringer. No. The Senate Judiciary Committee had finished its work when this was first broached. I put it forward simply because it is a new factor in the field. I do not endorse it. I think it is too early to take any real position with respect to it.

'The first reactions I have heard to it have been somewhat unfavorable. But I do not want to go any further in commenting on it. I have studied it, and I think it has some attractive features and some unattractive features. I would say probably its most unattractive feature is

its complexity.

Mr. Kastenmeier. On behalf of the committee, it might be useful for us if you would undertake to transmit that with any particular comments you would wish to make. Copies of the proposal—you say it comes off late in the game; but insofar as we have not heretofore received any proposal formally, it might be useful at least to have it in the discussion.

Mr. Railsback. Mr. Chairman, I wonder if I might just add to that. I wonder if any objectors to the proposal who have not had a chance to register specific concerns about it—I think we ought to consider it. I think it ought to be before us, because I think we ought to hear from both sides.

Ms. RINGER. I agree.

Mr. Kastenmeier. I am sure there would be no objection to that. Any other parties interested in appropriately commenting on the proposal, and care to do so, their views will be considered.

Ms. RINGER. In fairness to Teleprompter, I should say this put forward only as a fallback from their basic position, which is that there

should be no payment at all.

Mr. Kastenmeier. I think it is understood that many cable operators, depending on what organization they belong to, how they operate, what their personal view might be, vary from opposing any provisions to some sort of compromise. Furthermore, you did allude to concern that I think some of the copyright proprietors, broadcasters, filmmakers have; that, namely, in terms of the rate structure, that there be some flexibility considering the base computation, because of what some people foresee as radically altered bases for revenue in terms of cable television or pay television, or whatever it may be in the years ahead.

Some people, of course, see as I say a radically changed market, in which proprietors—owners of copyright material—may be dealing directly with pay TV or modified cable television operators. But the basis for revenue might be quite different than the subscription or the gross receipts tables that presently are in the proposed bill—I do not really know that we are prepared to make any judgment about that. But it is another late factor, it seems to me, in a consideration of

this section.

Are there other comments or questions of the members of the committee?

Mr. Drinan. Mr. Chairman, I wonder if you or Ms. Ringer could address themselves to whether that same jurisdictional dispute might exist between the Judiciary Committee and Commerce Committee concerning cable. I would be very happy to give cable to them, if the

Commerce Committee would want it.

Mr. Kastenmeier. May I respond to that, because that is a good question. It is the posture of the Chair to maintain some sort of communication with the chairman of the subcommittee, of the Commerce Committee, the gentleman from Massachusetts, Mr. Macdonald, on this question. And as we proceed, we have to keep him not only fully

informed, Lut he and members of this committee, as far as I am concerned, may participate—or at least have an input—into our deliberations.

I think it is necessary for us to move forward, obviating the impasse that we confronted in early 1967. But on the other hand, it is not necessary, I think, to do what the Senate did; to literally share jurisdiction with the copyright bill with that subcommittee. I think we can arrive at an agreement with them. At least, we can consult with them, and we can achieve a result which would not come to, let us say, jurisdictional disputes later in legislative proceedings.

Mr. Drinan. Thank you.

Ms. Ringer, on your last page—page 32—you say "We do not advocate congressional action to abrogate those rules as inconsistent with Federal copyright policy." If this bill were enacted, would some of

those rules be set aside?

Ms. Ringer. No. I do not think there would be any automatic action. This is a much-debated point in the whole area right now. I might add, in fact, that the trade press has indicated that within the last 2 or 3 weeks, the Domestic Council in the White House has been addressing this question under its deregulation activities, and apparently has focused in on cable and these rules in the copyright context, in part. I would say that the chances of a constitutional attack on the rules under this bill would be less than 50/50. I would personally prefer to see copyright matters handled by copyright law, but I do not think that things are quite that compartmentalized.

The Supreme Court, in the Southwestern case, upheld the FCC's right to regulate the importation of distant signals by cable, which does involve both communication and copyright aspects. What I would certainly hope is that the FCC would see the light, and, Congress having taken a position that this should be handled by compulsory licensing, would rethink a lot of its exclusivity details, which are extraordinarily complex and are capable of criticism on that ground.

Mr. Drinan. Is there any way by which we could fashion the law, or write in the report a congressional policy that the new congressional policy supersedes whatever rules might be inconsistent? Could that

preclude a lot of expensive, time-consuming litigation?

Ms. Ringer. I confess it would please me to see you do that. But I think it would displease a great many other people. This is a much broader problem than actually what is covered in sect 'n 111, and I am not sure that this could be sustained in both Houses and gotten through both Houses of Congress. Rather than daring something as large as that, I would be inclined to approach it on a somewhat more low-level basis.

Mr. Drinan. Is there any pending litigation that might result in decisions which would modify some of the conclusions you made here?

Ms. Ringer. The FCC nonduplication rules have been attacked in court, and I believe they are still in court. I do not know the details of that litigation. I do not think this would alter basically anything you would be doing here, unlike the previous situation.

Mr. Kastenmeier. The gentleman from Illinois?

Mr. Railsback. You do not seem to address yourself to the issue of public broadcasting—or maybe you did.

Ms. Ringer. That is the next chapter.

Mr. RAILSBACK. Excuse me. I will wait, and will come back for the next chapter.

Ms. Ringer. I hope we can get into it a little bit this morning.

Mr. Railsback. You have always recognized a distinction between the importation of distant signals and retransmission of local, and you are still recognizing that distinction. But you are not really suggesting how we might handle it. Do you have any further thoughts about that?

Ms. Ringer. If you want a single conclusion, it is the approach of the present bill—the general approach is probably about as good as you can do.

Mr. RAILSBACK. The graduated percentage?

Ms. Ringer. I agree with you that you now have before you this Teleprompter proposal, which is basically an effort to try to distinguish between the two and not pay for local signals. But in order to do that, you have got to do a lot of other things which alter some very fundamental aspects of the present bill. I am not so wedded to drawing a line between local and distant that I would strongly advocate that.

I might say that in the earlier efforts, the line was drawn between compulsory licensing for local and full liability for distant. Now, we are in a situation where you are paying as compulsory licensing for everything, and it seems to me there that when everybody has access, and pays depending upon a graduated scale, it is not quite as important

as it was before.

Mr. RAILSBACK. In respect to baseball or major league sports, it seems to me that there maybe ought to be a distinction between the minor leagues and major leagues. And there seems to be—there at least are allegations—that perhaps Boston, although Boston did very well this year, but we use it as a hypothetical—anyway, I wonder if maybe there is not some justification for exclusivity, based on where you have a spectator sport. And yet, the people who gave testimony did not have any empirical data supporting their argument, I wonder if you—

Ms. RINGER. Considered as a theoretical matter, I suppose you could

make that argument.

Mr. RAILSBACK. I think it is a valid distinction.

Ms. RINGER. I agree with you. If you are going to try to do it this way, this is a valid point. But to include organized sports, an exclusive right cutting cable out of the retransmission of one of its principal business assets, which is the ability to retransmit sporting events, it seems to me out of place in a completely compulsory licensing section which we have now.

In the Senate, in September 1974, they had gotten past the point where they were seriously considering putting it in the bill. But Senator Hart put forward a proposal that the FCC, which is considering this question, be directed to deal with it. I do not think it was too clear as to what they were supposed to do, but they were directed to address the problem of sports blackouts and the protection of gate receipts. The Hart amendment was defeated.

Mr. Railsback. Thank you.

Mr. Kastenmeie... The gentleman from New York, Mr. Pattison? Mr. Pattison. Is the \$25,000 exemption which has been suggested, is that a quarterly?

Ms. RINGER. Yes.

Mr. Pattison. So it is \$100,000 per year.

On the sports issue, is it your position that that really is more of a—better dealt with as a communications policy with the FCC, rather

than as copyright?

Ms. Ringer. Yes; I do not want to express an opinion, pro or con, on this. But I think that broadcasts of sporting events contain copyrightable elements, and the contributions of the cameraman, director, and to some extent the people that direct the halftime events, and so forth. I do not think that the game itself, as a game, and activities of the participants, the players, are actually copyrightable; and I think, in all candor, that copyright has been seized upon as a possible way of protecting blackouts. If Congress wants to protect organized sports this way, it should do it directly rather than through the guise of cable exclusivity.

I mentioned before that the first time I looked at the Senate version of the bill that emerged in 1973, it struck me very forcefully that everything was subject to compulsory licensing except organized sports, which was given a complete protection. This seemed a little bit out of

place in the orderly scheme of things.

Mr. Pattison. In your opinion, would the Teleprompter proposal tilt in favor of the urban systems, and essentially put the burden of

copyright on the fringe area systems?

Ms. Ringer. It would certainly work in their favor. I do not think there is any doubt about this; it would work in the favor of a system like Teleprompter, which gets most of its subscription fees from the retransmission of local signals in big urban areas. I do not think there is any doubt about that. It might have some beneficial effects for other types of systems, and it might have some beneficial effects for copyright owners, in comparison to this section 111 you now have. But I cannot really say what those ultimate effects would be.

Mr. Pattison. Would that not be essentially contrary to, for instance, the exemption for the small system at \$25,000 a quarter?

Ms. Ringer. It depends on what the small system is carrying.

Mr. Pattison. I agree. But is it not fairly typical that the small systems are fringe systems, small towns—and therefore, primarily carry imported signals?

Ms. RINGER. This is true.

Mr. Pattison. It would be really very contrary. The exemption in the Teleprompter system would really be two directly contrary approaches to the same problem.

Ms. Ringer. Yes; this is one of the reasons why the \$25,000 exemption was put forward by NCTA as a possible solution to this. You are saying, if I understand you, that these are really counter to each other.

Mr. Pattison. The argument is very arguable and logical that you only charge for the imported signal. If you could handle it some way without terrible complexity—but that kind of a ruling would favor the urban system, which basically picks up local signals and may make all of its money, and tend to make most of its money, from paid TV.

Ms. Ringer. You cannot really tell what is going to happen. Obviously, Teleprompter at one time—it has been the largest—it anticipated the possibility of bringing perhaps 25 or 50 signals containing different programs into New York City, for example. This was a technical possibility, and—

Mr. Pattison. Although there are not that many programs that

are available.

Ms. RINGER. If you wanted to use microwave relays, you probably could.

Mr. Pattison. There are not 25 or 50 programs being broadcast

anywhere.

Ms. RINGER. In the country, yes. If you wanted to bring them in from the heartland, and so forth, I think you could.

Mr. Pattison. You mean there are 25 or 50 independent signals? Ms. Ringer. You might have a lot of different "I Love Lucys."

Mr. Pattison. That is what I am talking about—excluding the repeats of the network programing, independent signals. I am not talking about signals that are owned by networks. I am talking about non-network kind of programing, where you actually are creating something. It is pretty rare—there are only about 10 independents that really do that.

Ms. Ringer. But they buy syndicated programs and play them over and over again. At any one time, you could easily find 50 different

programs.

Mr. Pattison. With the availability of 30 I Love Lucys on the same TV set at the same time, this certainly poses a great—

Ms. RINGER. No comment on that.

Mr. Kastenmeier. One question. It has to do with the practice—I am not aware of what the practice is in terms of vicarious liability for infringing performances, and the ballroom operator case; is that the practice the orchestra—whatever orchestra it is—must go to BMI and get a conseto play a repertoire of BMI pieces?

Ms. RINGER. 1 believe it is usually the entrepreneur rather than the individual orchestra that does take the license. It is a blanket license.

Mr. Kastenmerer. What you are saying is that the orchestra, which plays for profit, and in fact plays the music, does not pay a performing royalty?

Ms. Ringer. That is right, because the royalty is paid by the person who is providing the premises and is charging the admission. I think that is the usual pattern. I am sure there are variations to it, but essentially a band that goes into a place can assume that the person providing the physical facilities and so forth has a license from all three per-

forming rights societies.

Mr. Kastenmeier. Is there, in fact, a double payment? That is, if you had an orchestra, and obtained a license from the performing rights society for playing his repertoire, and also went into a place where the ballroom operator had also paid the same performing rights society for its license, is whether in fact that would be a double payment—your answer is, in fact, orchestras never do obtain?

Ms. RINGER. I do not know. This is something we could inquire. I

think it is a valid point.

Mr. Kastenmeier. Thank you for your—one more question.

Mr. Drivan. On a tribunal, we have had very, very little information or comments on it, and I am very afraid, frankly, of the implications of some of this in section 806, in that you seem to reflect that, too. As you indicate, section 111 was decided upon without any economic analysis of the royalties involved, and the final determination in any proceeding must be reported to the Congress, and either House can decide within 90 days. I can foresee all types of difficulties there.

How many final determinations from the tribunal would you imagine

would be forthcoming in a year or 6 months?

Ms. Ringer. On the ratemaking, there are currently in the bill, if a uniclude the recent Mathias amendment in the Senate, four. There are four separate fees that are set, and would be subject to review by the tribunal. It depends on how often the tribunal is able to review it. Under the Senate amendment, it would be once every 10 years after the first time. I would say that it would be very unlikely that all four would not be reviewed, and probably changed.

Mr. Drinan. Then it is very indefinite. As you intimate, it is very indefinite. What happens if either house sets it aside what happens?

Ms. RINGER. I do not know.

Mr. Drinan. This is very defective legislation, then.

Ms. Ringer. It obviously does not come into effect. But what happens with the tribunal? Can it go back and try again? Can it have a fallback it could put forward? It certainly is not clear. This does need clarification.

Mr. Drinan. Do you think it is wise to say that, upon assuring of good cause, this committee or the Senate Judiciary Committee may waive the requirement that everything be finished within 1 year? It is most unusual.

Ms. RINGER. Yes, it is most unusual. I am not sure anyone has raised that specific question before.

Mr. Drinan. 804(e).

Ms. Ringer. I am not sure you were here when I mentioned I would address the whole of that in a separate chapter next week, I hope.

Mr. Drinan. Thank you, Mr. Chairman.

Mr. Kastenmeier. That concludes this morning's discussions with respect to chapter V. We thank you, Ms. Ringer, and we shall next meet on Thursday, November 6, here in this room at 10 o'clock. I am not sanguine about whether it will be the last of a series of your discussion.

Ms. RINGER. May I ask, Mr. Chairman—I can get through this very much faster than I have. It depends entirely on what you want me to do.

Mr. Kastenmeier. I would say the present pace is correct. A quicker pace would be, I am afraid, too superficial for our purposes. Therefore, I think we should continue at this pace, even if it requires more than the meeting on November 6 to complete our work.

With the House calling us to the floor, we will adjourn.

[Whereupon, at 12:15 p.m., the subcommittee recessed, to reconvene at 10 a.m. Thursday, November 6, 1975.]

COPYRIGHT LAW REVISION

THURSDAY, NOVEMBER 6, 1975

House of Representatives, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY. Washington, D.C.

The subcommittee met, pursuant to notice, at 10:20 a.m. in room 2226, Rayburn House Office Building, the Honorable Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier and Railsback.

Also present: Herbert Fuchs, counsel, and Thomas E. Mooney, associate counsel.

Mr. Kastenmeier. The hearing will come to order.

This morning the committee again will hear from Register of Copyright in what we had hoped might be the penultimate installment of the closing testimony, but it remains to be seen whether that is achieveable. In any event, we are pleased to greet Ms. Ringer, who may take up where she left off.

TESTIMONY OF BARBARA RINGER, REGISTER OF COPYRIGHTS— Resumed

Ms. RINGER. Thank you, Mr. Chairman. I think I finished the discussion of section 111 and cable television last time unless the members have any questions. If not, I will go on to section 112, which is headed, "Ephemeral Recordings," under which I would like to discuss all of the issues remaining to be discussed in connection with nonprofit broadcast.

Under that heading—this is chapter 6 of the second supplementary

report draft—there are four basic issues.

The first has to do with the right of instructional broadcasting to make and distribute sound recordings of their exempted broadcasts.

The second is the so-called Mathias amendment, which has been adopted by the Senate Judiciary Committee and is now section 118 of the Senate version of the bill.

The third concerns broadcasts for the blind and physically handi-

The fifth has to do with the practice prevalent in the broadcasting of religious programs, which involves making tapes and disks of religious broadcasts, including copyrighted music.

Mr. Ratisback. Is that fourth or fifth?

Ms. RINGER. This is the fourth. The first is the Bayh amendment on instructional broadcasting tapes. The second is the Mathias amendment, compulsory license. The third is broadcasting for the blind and physically handicapped. The fourth is the music of a religious nature

tapes.

I just wanted to try to set this framework around this discussion. I will take each one of these up separately, and perhaps the simplest thing to do would be to have the questioning after each segment because

they are pretty discrete.

The first which was known, but is no longer known, the Bayh amendment is discussed on pages 3 to 8 of chapter 6. It does have a history which is traced there, and I think I can summarize it rather simply. Ephemeral broadcast tapes are traditional in the broadcast industry, both in this country and abroad. The term "ephemeral recordings" is a very well known one, and in effect, it is sort of an understanding or fair use type of exemption which allows a licensed broadcaster or commercial broadcaster, or a broadcaster in Europe that takes licenses for copyrighted material to make a recording, now almost always a tape, for the purpose of simplifying this broadcasting procedure. In other words, it has a license. It is understood the broadcaster should have the right to make one tape, which will allow it to broadcast or rebroadcast because of time zone problems and that sort of thing, and then destroy it after it has served its purpose. It is almost always one tape, almost always a rather short period. Six months is not uncommon.

When you get to ITV, you have a different situation. You do not have a license in the first place. The broadcasts themselves are exempted in the second place. The tapes are shopped around, as the practice has emerged over the last 15 years or so, and in the absence of an actual electronically connected network of instructional broadcasters, the tapes of these in-school broadcasts are shopped around from instructional broadcaster to instructional broadcaster, are kept for quite a

long time, and are reused.

Let me run down the history of this, which has gone through seven phases already. First, the bill back in the 1960's treated unlicensed ITV and licensed commercial broadcasting tapes the same way. They allowed one tape for 6 months, to be kept for 6 months and then

destroyed.

Second, ITV was singled out; a distinction was drawn in section 112 between commercial licensed broadcasters and instructional broadcasters, and two tapes were allowed in the latter case, and they were allowed to be kept for 1 year. I am not going into the refinements on this, but essentially it was two tapes for 1 year. Then when the bill got to the House floor in April of 1667, the instructional broadcasters, the public broadcasting representatives were successful in geeting all the restrictions knocked out completely. No limit as to the number of tapes or the length of time they would be kept.

Mr. Kastenmeier. May I interrupt because I do not recall myself this refers exclusively to audiovisual tapes and not sound recordings

only. Is that correct?

Ms. Ringer. It could include sound recordings. I think the basic—Mr. Kastenmeier. Does the same thing apply to sound recordings only?

Ms. Ringer. That is right. Actually, the whole concept of ephemeral recording grew up when there was not any television. As you recall—

I have forgotten the phrase that was used in the old days of radio—
"this is electrical recording," or something like that, as announced on the radio then. I do not think any distinction has been drawn in

principle.

But we are really, as a practical matter, talking about videotape. This is where the issue lies. The Senate took the bill over from the House at this point, and in 1969 when the subcommittee reported the bill, it put a limit back on the number and the time, but raised it substantially from the House committee's limits. The Senate limits at that point were 12 tapes for years.

Then in 1974, when the bill went through the Senate and passed on September 9, the 12 and 5 were raised to 30 and 7. I might say, in passing, that 7 does have a sort of magic meaning copyright law. I have never understood quite why, but it is interesting to see. You usually

come down to 7 somewhere along the line.

At the end of the Senate process, when the bill was on the floor, an amendment that had been offered by Senator Bayh to take the restrictions off again was discussed, and the feeling that is reflected in the debate was that this was not being rejected, but the consideration of it was being postponed because it was submitted too late. However, when the Senate came back to the bill in 1975, the Bayh amendment was not pressed. It was not introduced, and I am told, although I have not any personal knowledge of this, that Senator Bayh has decided not to put it forward again. So the bill was reported by the full Senate Judiciary Committee on October 7 with the 30 tapes and 7-year limit in it, and on this point I have been asked by Senator McClellan to comment, and I use as my comments in this report pretty much what I wrote to him on January 31, 1975.

The Copyright Office adheres to the position that some limitation is essential, and the 30 copies should be ample to facilitate the activities of nonprofit organizations. The circulation of as many as 30 copies, itself, presents some danger to creators since it is extremely difficult

to insure that unauthorized copies are not made.

But—and there is nothing magic about the 7-year cutoff—but I believe a limitation on the period of copies, that the copies or phonorecords may be held and used, is eminently sound. In other words, the Copyright On. is endorsing the 30-copy, 7-year limitation on the theory that you have to have some limitation, and that seems to be a viable one, although it may be a little excessive.

Now, if it is agreeable, I would like to stop for questions here, or if you would rather I go on and finish the chapter, as you wish.

Mr. Kastenmeer. Thank you. Yes; superficially, it would appear that 30 copies, 7 years would seem to be practically not a limitation, although as you point out, Mr. Aleinikoff says, it is still sufficiently restrictive to prevent practical application of this exemption through the rapidly changing electronic world of American education.

Let us make it clear precisely what he conceives of there. In what

respect might practical occurrence be restricted?

Ms. Ringer. I think there are cases now where they are.

Mr. Kastenmeier. Where the network requires more than 30 copies? Lis. Ringer. These are actually tape networks; that is the term that is used, and they may very well use more than 30 in some cases,

but there has to be a limitation somewhere, and as I tried to bring out here, you just keep raising the figures on and on. You have to reach a point at which you stop.

Mr. Kastenmeier. Is the 7 years thought to be restrictive?

Ms. Ringer. Aside from its mystical significance, I do not think it is anything more than a compromise.

Mr. Kastenmerer. It is almost like a short term of copyright itself

with a quarter of the first renewal term, first term.

Mr. RAILSBACK. May I inquire as to how all of this works? Can you explain to me how an instructional broadcaster shifts these things around?

Ms. Ringer. I think these situations vary. Now, we are talking only about the sort of thing that children receive in their classrooms or with some exceptions to this, the sort of things that are exempted under section 110(2). I think you have a teacher who goes into a studio and teaches a class with audiovisual aids of one sort or another, and this is videotaped and is put on the tube in various ways, and is sent around through the mail or express company type of thing.

Mr. Railsback. Thank you.

Mr. Kastenmeier. This is, of course, distinguished from public television.

Ms. RINGER. Yes; I am coming to that now. This is quite different. Mr. Kastenmeier. This is the definition of "for instructional pur-

poses." You may continue.

Ms. Ringer. Thank you. The next issue is a very live one; I think it is one of the most important questions you will have to consider because of the fact you are now presented, or likely to be presented, with a Senate amendment of rather sweeping scope and significance.

The Mathias amendment, so-called, is discussed on pages 8 to 21 of my report, chapter 6. What I deal with mostly there is an effort to trace the legislative history, first of the instructional broadcasting exemption in 110(2) and the reason why there is no exemption or other provision dealing with public broadcasting in section 110, itself, which is the basic provision dealing with the limitations on performing rights.

I think I might start with the quotation at the top of page 9, which is from the 1965 Supplementary Report of the Register, as to why, what were then somewhat embryonic public broadcasting activities

were not exempted:

The bill imposes no blanket for profit limitation on the right of public performance. In view of the recent upsurge in the number and importance of nonprofit performances—this was in 1965—particularly nonprofit broadcasts reaching huge audiences, we have concluded that a present blanket exemption for nonprofit broadcasting has become too broad in its application to the new conditions of today, and that it would involve serious dangers to the authors' rights if continued into the future.

In other words, we favored dropping the for-profit limitation with respect to public, noninstructional broadcasting of a nonprofit nature. This was more or less accepted by the subcommittee, I think. The history of this would bear out that this basic conclusion is not really disputed, that nonprofit broadcasting of a public nature should not

have any complete outright exemption. The nonprofit public broadcasters were not really urging that. Their urgings for an exemption

were directed to instructional television.

On the other hand, I think it is important to recognize that there is a not-for-profit limitation in the present law. The extent to which that applies to them is not all that clear. Unquestionably, some of their activities are exempted; others may not be, but, in any case, there is a sweeping not-for-profit limitation in the present law with respect to performances of nondramatic works.

When the Senate subcommittee reported the 1969 bill to the full Judiciary Committee on December 10, 1969, it rejected an amendment that had been put forward in the Senate. I am reading from the bottom of page 9, "To provide a compulsory license at regulated rates for the use of copyrighted material and the programs of public television which are intended for reception by a general audience."

This same position was adopted by the full committee, and it was also adopted after a great deal of discussion in the intervening years by the Senate when it passed the bill in 1974. However, before passage in September of 1974, on August 19, 1974, Senator Mathias introduced an amendment that would have added a new section 118 to the bill and the text of this provision.

This is the amendment on which you had hearings last June, I believe. It is laid out on pages 11, 12, and the top of page 13 of my report. I quote it verbatim. I will try to summarize it very briefly.

Essentially, it would create a compulsory license for public broadcasts of nondramatic literary and musical works, sound recordings, and pictorial and graphic and sculptural works. The public broadcaster would be required to make a registration or recordation of its identity.

Mr. RAILSBACK. Where are you reading?

Ms. RINGER. I am summarizing from page 11, which sets out the Mathias amendment in the form in which it was the subject of your hearings in June.

At least 1 month after the initial broadcast and at later intervals, the public broadcaster is required to record in the Copyright Office a notice stating its identity and address and so forth. That establishes

the compulsory license under this proposal.

Then the public broadcaster, or as it was called, any public broadcasting organization or institution, would deposit with the Register of Copyrights at intervals in accordance with requirements that the Register is supposed to prescribe a statement of account and the total royalty fees for the period covered by the statement under clause (2) of subsection (a) of this amendment. The royalty rates under this section shall be determined by the Copyright Royalty Tribunal as reasonable royalty rates for the inclusion of nondramatic works in public television and radio broadcasts. Such royalty rates may be calculated on a per use, a per program, pro rated or annual basis as the Copyright Royalty Tribunal finds most appropriate with respect to the type of the copyrighted work and the nature of broadcast use.

In other words, the framework of a compulsory license is set out here, but practically all of the details are left either to the Register of Copyrights or to the Royalty Tribunal, including the periodicy of the reporting and accounting and the amounts of the rates as they

apply to various types of works. And as I say, there were four types of works included under the original Mathias amendment: Nondramatic literary works, nondramatic musical works, sound recordings, and graphic works. Those were the four types. They did not include audiovisual motion pictures or dramatic works, including dramatic Omusical works.

Mr. Kastenmeier. Why did they not?

Ms. Ringer. I think-

Mr. Kastenmeier. Because presently they were commonly negoti-

ated between the parties?

Ms. Ringer. Yes. And of course, this is what you see on public television, either public television's own dramatic presentations or dramatic works or motion pictures that they have licensed from suppliers, from motion picture producers, and audiovisual producers.

Mr. KASTENMEIER. By and large, what this covers is really marginal

programing material in terms of public broadcasters.

Ms. Ringer. I would not necessarily call it marginal. It is the sort of thing that goes into the audiovisual works and motion pictures that they then put on.

Mr. Kastenmeier. Practically speaking, for which they might have

difficulty obtaining clearances.

Ms. RINGER. This is certainly their argument. That is correct.

Let me pursue this a little bit.

This proposal was introduced as a formal Senate amendment and was mentioned briefly, as was the Bayh amendment, at the end of the Senate debate on September 9, 1974. Although not adopted, it

was not rejected either.

I am reading now from the middle of page 13. When the Senate Judiciary Subcommittee resumed its consideration of the revision bill in the 94th Congress, efforts were made to resolve the problem of public broadcasting through negotiation, and a number of meetings aimed at blanket voluntary licensing were held. A mover of this effort was the Counsel to the Senate Judiciary Subcommittee, Mr. Brennan. The Mathias amendment was not adopted by the subcommittee when it reported the bill to the full Senate Judiciary Committee on April 13, 1975. But the following statement was issued, and I have repeated it in full since it is an element in the continuing legislative history of this provision.

In effect, it recounted that, at the request of the chairman of the subcommittee, a series of meetings had been held. And I think the thrust of this is that they had held some promise. And the final paragraph read: The subcommittee will maintain its interest in obtaining a mutually satisfactory solution. The subcommittee expresses the hope that a

complete agreement will shortly be reached.

The meetings—I attended them myself—tended to look like they held some promise for working this out on a voluntary basis, and I believe I even mentioned that in my opening testimony—that I hoped that this problem could be solved without having you have to consider it in a completely new provision, the compulsory license provision, now in section 118.

On July 10—I was wrong, it was July 10, 1975, that your subcommittee heard testimony on the various amendments from panels representing the various sides. I have tried to summarize this testimony on pages 14 through 17 or 18, rather. I do not think I need to read all of that here. That has been fairly recent testimony before your subcommittee.

I am now reading from page 18. Both sides of the House hearings referred to the ongoing negotiations and to some of the problems that had been encountered, including questions of compulsory arbitration and antitrust exemptions in anticipation of the impending markup of the revision bill by the full Senate Judiciary Committee. The representatives of the public broadcasting industry again pressed for adoption of the Mathias amendment, which was adopted with some changes by the full Senate Judiciary Committee as section 11% of S. 22 as reported on October 7, and I here lay out the whole text of that which does, as I say, contain some changes. The text appears on page 19

through the middle of 21.

And I am now reading from the middle of 21. The comparison between the 1974 and 1975 versions of the Mathias amendment discloses some changes in language and structure. There are two important substantive changes. One, I think, can be disposed of quickly. Sound recordings have been dropped completely from the bill, from the compulsory licensing system. And the second, the structure and language was changed, and let me read this. It is item 2 at the bottom of page 21. Instead of making the act of "public broadcast" subject to compulsory licensing, the new Mathias amendment grants an exemption to "a public broadcasting entity", subject to compliance with the compulsory licensing requirement. The new "public broadcasting entity" is defined as "any licensee or permittee of a noncommercial educational broadcast station or any nonprofit institution or organization engaged in public broadcasting".

The latter term, "public broadcasting," is defined very broadly indeed. Taken literally, this change could vastly expand the scope of the amendment beyond anything discussed in the House subcommittee hearings. This has been the subject of discussion since I wrote this chapter, Mr. Chairman, and I believe that the intention was not as broad as the language would suggest. But it does be peak the neces-

sity for considerable revision if this provision is to be accepted.

Mr. KASTENMEIER. Practically speaking, what entities might it in-

clude that the original Mathias would not have included?

Ms. Ringer. I think probably the purpose behind this was to allow entities such as schools and academic organizations to share any compulsory license that there has been. And I'll come to this again. Briefly, there has been a suggestion during all these meetings that the assumption be sufficiently broad to permit schools to video-tape off the air public broadcasting programs like "Jenny" or "Upstairs, Downstairs".

Mr. Railsback. Other than instructional—

Ms. Ringer. Well, yes, because that is what is on public broadcasting, and use it for instructional purposes, but under very restrictive circumstances. The discussions would have put limits on the time that these could be used and the purpose they could be used for and so forth. But none of this made its way into the Mathias amendment.

And I may be wrong about this, but my assumption that in very broadly defining your broadcasting entity to include permittees, the

intention was to expand this to include anybody who might want to use a public broadcasting program for a legitimate purpose. I think it went way beyond what was intended.

Mr. Kastenmeier. If it is at all subject to compliance with the compulsory licensing requirement though, even a school would have to, for

such materials, get a compulsory license.

Ms. Ringer. I would say that the language was clumsily drafted. But I think there was much concern among copyright owners that it went beyond the sort of licensed public broadcasting entities that were originally contemplated. In any case, I do not want to overstress this, Mr. Chairman, because if this provision is included, it will have to be very substantially redrafted.

I think the sponsors would agree with this. I do not think anyone is insisting on the exact language. I think what we are striving for now is some idea of what is needed and wanted so the Congress can go ahead

and make its decisions.

I am now going to read from page 27, which includes my comments and recommendations on this whole matter. And I think if you will bear with me, I will read them completely because I do not think I can summarize them very effectively.

The failure of the negotiations, aimed at finding a voluntary solution to these problems, which seemed so promising at the time of the

House hearings in July 1975, is to be regretted and deplored.

Now, I might say that when I wrote this, it looked like this had completely broken off, that there were going to be no further discussions and voluntary negotiations. There have been meetings since then, and I think that perhaps the discussions, at least, are going forward again. There has not been a complete failure and an agreement

to go off in different directions.

Compulsory licensing has been, and should be, regarded as an extreme last resort in copyright law. Despite the expressions of blame and disappointment now being exchanged, the Copyright Office remains unconvinced that voluntary arrangements are impossible other than under the compulsion of government regulation. It is true that public broadcasting is not paying anything now, that it enjoys at least some degree of exemption with respect to completely nonprofit performances, that its budgets remain low and clearances difficult, and that it is offering to pay fair royalties in the future under a compulsory license. It has also failed so far to gain the terms it was seeking in voluntary negotiations. But to conjure up the threat of massive government-run compulsory licensing machinery in an effort to improve its bargaining position is, I believe, of questionable necessity.

A careful review of the statements made during the negotiations in various written submissions, and at the hearings, indicates that clearance of music is public broadcasting's foremost concern and that a major impediment to a voluntary solution to that problem has been

the lack of a statutory antitrust exemption.

In other words, public broadcasting is seeking a single license on a voluntary basis, or, if they cannot get that, on a compulsory basis. And the various interests that are involved on the other side of the negotiations are concerned, and I think with some reason, that they may be getting beyond what the antitrust laws permit in dealing

jointly with public broadcasting on a one-to-one basis. There are three performing rights societies, and there are music publishers and agencies and so forth that are involved in the making of recording licenses in this area, and all these licensing organizations have to be involved in any kind of voluntary agreement, and they are saying they need an antitrust exemption in order to do this.

At the same time, enactment of such an exemption has implications and unforeseeable consequences beyond the current problems of public broadcasting. A compulsory license limited to nondramatic musical compositions, might, in view of the organized structure of the industry,

be made to work fairly well.

In other words, if you could get an antitrust exemption, you have got enough organization and few enough entities in the field to make this a practical possibility. Certainly, the dangers in compuls ry licensing of literary works are less evident in the case of music. In other words, we have a lot of blanket or compulsory licensing in music under one form or other already, and the restrictive problems that I find in the case of literary works are not as serious in the case

Mr. Railsback. May I ask you exactly how is it working now? What are the procedures? What are the problems under the current law?

Ms. Ringer. Under the current law—we are talking about music and public broadcasting—there are no licenses at all. Public broadcasting is using music and is not paying.

Mr. Railsback. How about literary works?

Ms. Ringer. I would say the same situation is true, as a generality.

Mr. RAILSBACK. And they are not paying royalties?
Ms. RINGER. That is right. Let me make clear, Mr. Railsback, that the present law in sections 1(c) and 1(e) makes clear that nonprofit performances are exempt. They are not included in the exclusive rights of the copyright owner, but this does not cover nonprofit recordings that are made for broadcasting, and it also does not cover some equivocal types of public broadcasting such as the sort of thing like a "Jenny" or an "Upstairs, Downstairs" where you see Mobil on the screen and where Mobil Oil advertisers in the New York Times, "Watch Channel 13 tonight."

Mr. Rahsback. But your feeling is with the development of public broadcasting, with this tremendous expansion, that now literary works, if there were compulsory licenses, could really be jeopardized

as far as their copyright owners-

Ms. RINGER. Yes; I feel that—what I am trying to say right now is that I think the danger to copyright owners in the field of music is not as great as it is in the whole range of literary works. This is my feeling. I try to develop that a little bit later. And perhaps we can

come back to this point after you have heard me out.

I am actually about to make this point that the Copyright Office considers the dangers of an unqualified compulsory license for literary works so great and the need for it so unproven, that it could not support a copyright bill containing such a provision, including the revision bill as it was reported by the full Senate Judiciary Committee on October 7, 1975. The loss of control by authors over the use of their work in a major mass communications medium, and the dangers of state control and loss of freedom of expression implicit in the proposed system, would probably be too high a price to pay even if public broadcasting were being severely hampered by the legal obligation to get clearances. But, aside from the problem of reading to the blind, discussed below, it cannot be said that the practical problems of public broadcasters in getting clearances for reading literary works, have been illustrated convincingly, much less proved.

It has been suggested that the problem of loss of control might be solved—and I am talking now about literary works—might be solved by requiring a notice to be filed, perhaps 2 weeks or 1 month in advance, by the public broadcaster on the copyright owner-presumably at the last address shown in the records of the Copyright

Office.

This suggestion has been thrown out informally, thus providing a right of refusal. And there is a precedent for this in the bill—section 110(4)—where you can go out and do something if the copyright owner does not object in advance.

We have serious doubts about both the practicability or the necessity of such a system, though obviously it would be preferable to a raw

compulsory license.

And the problem of pictorial, graphic, and sculptural works, including photographs. This practical problem strikes us as a great deal more real than that of literary works. Here, the public broadcasters needs are obviously demonstrable, and the difficulties involved in individual clearances more evident. They do use a lot of graphics, and they are not paying, and they are not getting clearance. I am not sure that there is any organized way of trying to get clearances.

Mr. Railsback. Why is it more difficult?

Ms. RINGER. The reason is very simple. There are just no organized agencies besides a few. There is the Bettman Archive and Magnum Pictures and that sort of thing, but aside from agencies of that sort which control very large masses of pictures—and you sometimes do see credit lines in magazines next to a reprinted photograph, for example—but there is no organized licensing arrangement, unlike literary works, where you do have at least a publisher you can write to that normally has a rights and permissions department that is set up to handle this sort of thing. You do not have that kind of structure in the graphic area. That is not to say that it could not be created, but it just does not exist now.

Should a compulsory license be established for music, its extension to graphics might be justified in theory. A problem here is that there is no organizational representative to speak for artists and photographers. And my point here is that they really have not been consulted, that their works are probably being discussed and dealt with without anyone really being able to speak for them in these hearings or anywhere else. In fairness, their rights should not be swept aside in the interest of expediency and business convenience. It bothers me a great deal that we are blithely saying you are going to be subject to a compulsory license when nobody here has spoken to this from what I know personally to be a great huge body of artists and photographers out

there who would be very disturbed about this if it happened.

Mr. Railsback. But at the same time, as I understand it, they are going to be paying royalties, and those royalties will be determined by a tribunal. That is the other side of it.

Ms. Ringer. Yes; this is true. But my point generally in this chapter, in this section, is that a compulsory license is not just some simple little thing. You are giving up very major rights. And you have got to have somebody out there fighting for you.

What I am really saying is that I am perfectly well aware that public broadcasting has problems in this area and is not paying now. It is not getting clearances. And it is in the respectful position of now saying, yes, we want to pay, and we will pay through a compulsory license.

What I am saying is that there is nobody on the other side to say yes or no. They just have not been heard. This bothers me a good deal, although I am not justifying the present situation one way or the other.

Let me summarize this. This is point (f) on page 29. The Copyright Office is not convinced that any compulsory license is necessary for public broadcasting. But if Congress considers that some sort of compulsory licensing is needed, we believe it should be confined to music and that the Mathias amendment should be completely rewritten to make its vague and ambiguous language conform to the language and content of the revision bill, to insure that it goes no further than intended or needed, and to provide for a workable and fair administrative framework. The rights to perform and to make and distribute recorded programs should be limited to bona fide noncommercial educational broadcasters and should be carefully circumscribed in the statute itself.

I make the point at the top of page 30 concerning schools making videotape recordings and say that since this is a section 107 problem, it should be dealt with in this context. I have since had second thoughts about this, Mr. Chairman, since I wrote this chapter, and I am inclined to think that this should probably be dealt with in the bill, that if my interpretation of the intention behind the definition of public broadcasting entity is correct, then this question of taping in the schools should be addressed somewhere in this section and not floating in midair and voluntary arrangements. This is assuming that there is a 118 in the House bill.

One possible way of dealing with the problem of pictorial, graphic, and sculptural works might be to provide a temporary moratorium. This is in an effort to try to address your question, Mr. Railsback. During the moratorium, public broadcasters would be free to use graphics, but only if they made reports on the works used, and the nature and frequency of their use, to the Copyright Office. And I say the Copyright Office because I do not know who else would be able to assimilate the information.

The Office could be charged with the responsibility to report its findings to the congressional committees by a certain date, together with recommendations for legislative action. It could be hoped that, out of this process, a nationwide clearinghouse arrangement with standard fees and blanket licensing agreements covering graphics. could be evolved.

What I am suggesting here must be obvious to you, is to establish a little bit of a compulsion to get organizations set up and to get some ideas of what fees ought to be paid and who they ought to be paid to. I think this is an important problem, and I am not sure that I think this is a better way of approaching it thar just putting it into a compulsory licensing system and hoping for the best. But I will leave it at that.

The Copyright Office opposition to compulsory licensing schemes involving primary uses of literary works, even if combined with advance notice and right of refusal, is deep seated. At the same time, we recognize the advantages in centralized blanket licensing on a voluntary basis for all concerned.

Mr. Kastenmeier. Let me interrupt here because here again, this repeats your position laid out on page 28, section c. I take it this is what you have in mind, is primary uses of nondramatic literary works.

Ms. Ringer. That is right.

Mr. Kastenmeier. How is it that public television would use non-

dramatic literary works?

Ms. Ringer. Actually, they use quite a lot in children's brackasting. I think there is quite a lot of reading of children's books on children's programs.

Mr. Kastenmeier. A chapter a day, that kind of thing.

Ms. Ringer. Or maybe even a whole book. Children's books are short, and I think there are cases where a great deal of the text, if not the whole text, is read out. There are occasions where on something like "Book Beat," which is a book review interview program I have heard, and this has been used as an example. A whole chapter, or very large excerpts from the chapter were read out. There are examples of it; they do not want to make the clearances, but to set up a whole compulsory license just for this kind of little use on television which does not seem to be that important.

There are cases in public radio where very substantial amounts are read and not just for the blind and not on subcarriers. These are cases

where large segments of novels, for example, are read out.

Mr. Kastenmeier. I am not familiar, personally, with anything

television uses, like the readings of literary works.

Ms. Ringer. I am not sure they are concerned about lengthy readings, Mr. Chairman. I think they are concerned about readings, period, and readings of political writings and that sort of thing.

Mr. Kastenmeier. That which would not be fair, you said, under any

circumstances.

Ms. Ringer. There is a line somewhere, and I would say that in fair use in public broadcasting on open-circuit nationwide or any completely open context, the amount that could be used would not be huge.

Mr. Kastenmeier. That is what I am wondering. Inherently, I do not see where the abuse could take place so that the author would really have a damage to—possibly to the control of his work—but not in any other regard.

Ms. RINGER. You are saying economic advantage. And I do not think there is a great deal of money involved in this issue. I think there is a huge principle involved in this issue. I have not mentioned poetry—

children's books and poetry-

Mr. Railsback. What about cookbooks? Do they not read cookbooks?

Ms. Ringer. They may, Mr. Railsback. If they do, I am unaware of

it, but they may.

Actually, I am not just repeating my point here at the bottom of page 30, Mr. Chairman. I am actually going to make another point, which is that if public broadcasting has a problem here, it is really using a cannon to kill a flea, to bring out the compulsory licensing mechanism to solve it. We recognize that centralized, blanket licensing on a voluntary basis has advantages for all concerned. We also recognize that negotiations toward this end are not going to occur automatically and need to be encouraged if not induced.

The discussions that have been held under the auspices of the Senate Judiciary Subcommittee would not have taken place without the efforts

of that sucbommittee to have them take place.

We do not favor a moratorium in the literary area, but perhaps this same effect could be achieved by limiting liability for statutory—or perhaps even actual damages for a stated period, during which the patterns of use and the practical needs of copyright owners and users could be studied in some depth.

As already indicated, whatever its substantive content, the language and structure of the Mathias amendment needs thorough revision.

In addition, if changes in the duties and functions of the Copyright Royalty Tribunal are contemplated as a result of actions on the Mathias amendment in either House, a careful review of the substantive and procedural impact of these changes on the workings of the other compulsory licensing provisions in the bill should be undertaken at the same time.

In other words, the Mathias amendment, section 118 of the Senate bill as it now stands is not really workable as a compulsory license, and a great many procedural questions involving the Copyright Royalty Tribunal need to be considered in that context. If you are going to do that, the changes that you might make in order to accommodate the Mathias amendment could have very radical effects on the working of other compulsory licensing that we have been discussing. And I think this all needs to be carefully considered and integrated. And that is the end of my comments on the Mathias amendment.

Shall I go on?

Mr. Kastenmeier. Please continue.

Ms. Ringer. The next point is the side product of this, the question of broadcasting for the blind and physically handicapped. And the discussion of this starts on page 22. A byproduct of the negotiations aimed at voluntary licensing for public broadcasting was a proposal to exempt the reading of literary works and broadcasts to the blind from copyright liability. No agreement on this issue could be reached during agotiations. So on July 3, 1975, the Senate Judiciary Subcommittee reported S. 22 to the full committee with a new subsection adding the following performing rights exemption in section 110.

Now you do not have this before you in your bill because this was added by the Senate Judiciary Subcommittee in July. This would be completely exempt under section 110: performance of a literary work in the course of a broadcast service specifically designed for broadcast

on noncommercial educational radio and television stations to a print

or aural handicapped audience.

I am not going to lambast this too thoroughly, but it is pretty loosely drafted, and I do not think many people would argue that it should stand as it is written. I would point out among other things that it refers to literary works which would include plays. It does not say nondramatic, so it could include any dramatic work. That is only one

of its several problems.

Your subcommittee heard testimony on this on September 18, 1975 separate from the public broadcasting testimony which had been in July. While reserving the position of his organization on the language in which it is expressed, the representative of the Association of American Publishers endorsed the principle of a limited exemption for broadcasting of copyrighted works to the blind and deaf. A representative of the Authors League, however, opposed the position adopted by the Senate subcommittee as well as another proposal which had been put forth by the American Foundation for the Blind. And I think it is important enough to have included at the top of page 23 because it lay the basis for a later proposal which I think may, possibly provide a solution to the problem.

The authors' opposition was based partly on the broad and ambiguous wording of the proposals and on the lack of demonstrated need for exemption. It was pointed out that the division for the blind and physically handicapped at the Library of Congress obtains royalty-free clearances expeditiously for a large number of braille and recorded

editions of copyrighted works.

The representatives of public radio supported the Senate subcommittee amendment and urged that a corresponding right to make ephemeral recordings in this situation be written into section 112. That point, I think, should not be forgotten. Mr. Chairman, obviously this stuff is done from tape, and the section that is written into 110 in the Senate version does not deal with the question of recordings. Obviously, that is another technical defect in this whole thing.

On October 7, 1975, the full Senate Judiciary Committee reported S. 22 without any change in the new section 110(8). Meanwhile, however, Durward K. McDaniel, national representative of the American Council of the Blind, wrote to Chairman Kastenmeier presenting a revised text of the Council's earlier proposal, this time limiting the exemption to performance "on any subsidiary radio carrier authority

or cable transmission."

In other words, the idea is to have an exemption, make it clear what you are talking about, limit it as appropriate to make it a practical matter, and at the same time, not allow this to go on in public AM radio. There are a few cases where there are not subcarriers available in the area being covered and where they are using public radio. But that means that you can turn your car radio on and listen to this stuff long read out without any royalties and without any control or licensing of any sort.

On this whole point—I will turn now to page 31—I say the recent proposal of the American Council of the Blind appears to form the basis for a reasonable con promise based on limiting the exemption to subcarriers or restricted cable facilities. Where royalty-free license

is desired for broadcasts and other transmissions going beyond those permitted under the exception the possibility for expediting clearances would be to use the procedure proposed in section 710 in the current Senate version of the bill.

This is, I am sure, quite mysterious to you because we have not gotten to that chapter yet, but chapter 7 is the Copyright Office chapter of the bill, and section 710 has been added in the Senate to permit automatic, more or less automatic, voluntary clearances for making braille and recordings by the Library of Congress for the blind as a part of the copyright registration process. It is a completely voluntary thing, but it would expedite clearances and make the whole thing rather automatic and self-operating.

I have explained this here. I think the same kind of system could be used for readings to the blind on public radio that go beyond what might be permitted under the American Council's proposal. In any event, the language of section 110(8) in the current Senate version

needs substantial tightening and clarification.

This is the end of my statement on that point.

Mr. Kastenmeier. Do we have the language of 110? This is on page 22?

Ms. RINGER. Yes, on page 22.

Mr. Railsback. May I ask a question. Do you then favor the Council's new language?

Ms. RINGER. Not exactly. I think it provides the basis for a reasonable solution. I think it has a lot of qualifying language in it that is

needed in order to put a provision like this into the bill.

Mr. Kastenmeier. One of the problems that appeared at the time of the testimony at the hearing on this question was what, in fact, is a program specifically designed for—to aural handicapped audiences. And as you pointed out, would it be rendered unattractive for a general audience? Is there any discriminating way that such a broadcast could be made so that the general audience would have more interest in it? Because obviously, there is a temptation to design a program for as large an audience as you can get for the handicapped.

Ms. RINGER. This is the problem.

Mr. KASTENMEIER. That point has never really been clarified.

Ms. Ringer. I honestly think that the McDaniel proposal contains a built-in answer to the problem because what the public broadcasters say is that we must entirely do this on subcarriers and maybe some cable. In other words, if the blind have special equipment, either cable-equipped or equipped to receive subcarrier—subcarriers, by the way, are the sort of things like music services that you hear in supermarkets and that sort of thing, but the publicannot get it unless you want to take some sophisticated equipment and tamper with your receiving set, which most people-are not going to do. They are not going to do it just to receive things for the blind. And so I think that as a practical matter, this would probably solve it, if it were limited to subcarriers.

And if I understand what the public broadcasters have been saying, there are only a few isolated cases in which they have to broadcast on FM circuit, and in those cases, what I am saying is there is a great disposition on the part of authors and publishers to grant voluntary

licensing. But they want to be given that opportunity. They just do not want the right to be taken away from them, and they want to be able to say, "Yes, you can do it," but they are not, apparently, insisting on receiving any payment.

And I would say that they are not willing to say that we would

grant licenses in every case, and I do not blame them.

I might say, Mr. Chairman, in this context, that a recent story in the paper that I read—I think it was in one of the newsmagazines as a matter of fact-indicated that the Washington Eye, which is the public radio to the blind in Washington, has been broadcasting things that commercial broadcasting could not handle. And the two examples that were mentioned were the "Joy of Sex" and "Fear of Flying." This is stuff that the blind would like to hear as well as the readers would like to read. It is something that is popular. But it really should not be put on the open circuit without the author's permission. I am not sure that Erica Jong would want "Fear of Flying" to be read out on AM radio in toto.

Mr. Railsback. You mean it was just read over the radio?

Ms. Ringer. On a subcarrier here in Washington, yes.

Mr. Railsback. Unedited? Ms. Ringer. I do not know.

Mr. Kastenmeier. You say, "subcarrier." Precisely, what are we

talking about?

Ms. RINGER. I do not know the electronics of it, but you have an FM signal and apparently it is possible in most instances for physical reasons, reasons of physics, to put a subcarrier signal out under that license signal which can be received on very special equipment, and the blind are furnished this equipment by the various organizations that operate for their benefit.

Mr. Ransback. What about captioned news on television where the regular ABC news is shown several hours later, but with a printed explanation continually flashed across the screen for those who cannot hear the broadcast, but anyone can watch and listen. How do you feel

about this?

Ms. Ringer. I feel they should be licensed, and I think that in the cases where it is being done now, they are, and that no royalties are charged. But if you take the right away, then this can, of course, get out of hand.

I watch channel 7 news on channel 26 at 11 o'clock every night.

Mr. Kastenmeier. The caption headline presumably would not run a clearance or license—that Mr. Railsback referred to—would not, require any preclearance or license. The reading of captioned headlines.

Ms. RINGER. No. This is not the reading of captioned headlines. This is the performance of Harry Reasoner's news broadcast on public television with large captions which can be read by the deaf. In other words, they see the graphics and then read what the commentator is saying in capsulized form. And I think that should be licensed.

If I may go on, the final point in this chapter is the question of ephemeral recordings of works of a religious nature. Section 112(c) first met the light of day on February 8, 1971, when Senator McClellan introduced S. 644, the 1971 version of the revision bill, with one minor change that has remained a part of the bill since then and was

the subject of hearings in both houses before the Senate Judiciary Subcommittee on August 1, 1973, and before your committee's subcommittee on September 18, 1975. The provision was sponsored by the Association of National Religious Broadcasters, NRB, and would exempt as a form of ephermeral recording the making of a nonprofit organization of a single reproduction of a program containing nondramatic musical works "of a religious nature" for use in a single broadcast by a licensed broadcaster.

In other words, everything is single here except that they will make as many tapes of discs as there are stations carrying the broadcast. That is the way they operate. They make a tape and reproduce it in as many copies as are needed for their local broadcasters and

then send them out.

This was objected to by the representative of SESAC who was also representing other performing rights societies and musical copyright owners who put the issue in slightly different terms—whether or not a religious program producer can use a piece of religious music and distribute it to approximately 4,000 radio stations without any compensation to the creator of the religious music. He argued that a payment of mechanical reproduction fees in this situation would be nominal, but to withhold it altogether would violate established trade practices and discriminate against the creators of music of a religious nature, a term he considered questionably vague.

The representatives of religious broadcasters—I am reading from the bottom of page 25-stated that religious programs are produced on tape or disc for distribution by mail of one copy only to each broadcast station carrying the program. None of the programs are prepared for profit, and the program producer either pays the station to carry the program or furnishes it free of charge. The stations have performing licenses so that the copyright owners receive compensation. Following the performance, the tape is returned or the disc is destroyed. And NRB argued that to require a second payment for the mechanical reproduction would only drive some of the copyrighted

music off the air.

That is the gist of the arguments, Mr. Chairman. And on pages 32 and 33 of this chapter, I say we take no position on this basically. But I do not think it should be left at a point which seemed to emerge during the hearing which questioned whether or not this was constitutional because of the establishment of the religion clause of the Constitution. There a a precedents with respect to religious services and works of a religious nature in the present law. And as for the revision bill, it seems to me unlikely that this would be considered questionable constitutionally. We are trying to find here an area of nonprofit broadcasting that should not be charged for, and it is very common in foreign laws and it exists in the present law, to exempt this genus of nonprofit broadcasting or performance from liability. I just cannot see the constitutional problem there.
On the other hand, I do not think that the Copyright Office should

take a position on the substance. This is a question, I think, that should

be left entirely to the Congress.

Mr. Kastenmeier. Why do you say that?

Ms. Ringer. I think there are two special interests involved. I think Congress has to decide which way to go. When it gets down to that kind of bare question, we will duck. It is that simple.

Mr. Railsback. This is the first time you have ducked.

Mr. Kastenmeier. You take a very tough line with respect to the Senate Judiciary Committee's action with compulsory licensing for literary works. Before, you went so far as to say that the Copyright Office could not support a copyright bill containing what the Senate has contained in its bill.

Ms. Ringer. The distinction, Mr. Chairman, is very clear to me. I am not sure I am going to be able to make it clear to you. But it seems to me that that goes to the heart of the copyright law, I think, in saying that the Copyright Office opposes quite fundamentally a compulsory license that would deprive authors as a general class completely, authors of literary works completely, of any right to control the use of their works in a very major communications medium. To say that we oppose that is not to take a position between special interests on a narrow question. I think that is a very basic question, a very fundamental question.

I have no hesitation in taking a position. I do not think of authors, Mr. Chairman, as a special interest. Authors generally. I really do not. I think the organizations that represent them are special interests. But when you are talking about the basic beneficiaries of the copyright

law, I do not consider that——

Mr. Kastenmeier. What about composers?

Ms. RINGER. Same thing.

Mr. Kastenmeier. How about the composers of religious music? Ms. Ringer. I am saying here that the basic question whether or not a performing rights society, if you will—and I think SESAC is the only one that has made efforts to collect in this situation—whether or not they collect from the producer of a religious program, in addition to collecting from the local broadcaster that is carrying the program. This is a special interest question. And I think that the distinction is very clear to me.

When you get to a point like this, it seems to me that Congress should decide it. I have personal views on it, sort of, but I do not

think it is all that important a question.

Mr. Railsback. In other words, the various stations do pay for that performance. They do pay, do they not? They do not pay the mechani-

cal royalty, however.

Ms. RINGER. Yes; but they are not paying for the making of the recording, and this is what SESAC has argued. It seems to me there is a very fundamental difference between—I might give you a little preview of some of my other testimony—I am going to duck on several other things, and perhaps that will give you some idea of how I view these things.

I think the ultimate resolution of the jukebox question, whether or not it should be \$8, whether or not it should be under a Tribunal, is a special interest question which we will duck. This is something that only Congress can decide. If you want to ask me my personal views on it, I will tell you, but I do not think this is something that

the Office ought to take a position on.

And the distinction there I was trying to bring out is that we think that the jukebox operators should pay. Similarly, we are not going to take a position between, for example, 2½ cents and 3 cents on the mechanical. This is not, I think, the Copyright Office's role.

Mr. Kastenmeier. I do not see your distinction as characterizing it as a special interest. Really, all interests in this bill are, in one form or another, special interests. A few of them are so broad as to com-

mand any other term.

Ms. Ringer. Perhaps that is tru- Ir. Chairman. I have tried. I have thought about this a very great deal in trying to decide how far I should go in expressing positions on this.

Mr. Kastenmeier. I do not think we should use the term "special

interest" in the derogatory sense.

Ms. Ringer. Do not misunderstand me. Not at all.

Mr. Kastenmeier. They can be distinguished from other interests

so they are in fact special.

Ms. RINGER. Let me say on this that I am very concerned about what is happening to the copyright law which is aimed at—I do not think anyone will deny it—protecting authors. And in that regard, I think you have to look at a very large picture, and when you come at something like the compulsory license for literary works on a medium that is the universal broadcasting medium everywhere else in the world, on nonprofit broadcasting, and you say you are going to deprive authors of the right to say what the terms are under which their works can be used, except economic ones, then you are doing something that we have never done in this country before in relation to copyright law. It seems to me that is quite a different matter from whether or not religious broadcast producers should pay SESAC royalties.

Mr. Kastenmeler. I understand your point although I would say in terms of a colloquy on the question, that it is the interest of a literary copyright proprietor, which would be the author, whose publishing authorization is far more marginal in this sense of communication. He does not rely on making his money with whether his work is read in part or whole in television than really composers who rather more depend on television and broadcasting as the media for communicating their created work. While I get the principle you are expounding, I think practically speaking, I think there is a disparity really

as to what the effect of this really is.

Ms. Ringer. I guess it depends on whether or not you are talking only about money or if you are talking about copyright as something more than that. And I am talking about copyright as something more.

Mr. Kastenmeier. On this particular question—religious programs-my recollection was-and I am not clear because we do have part of the Senate report, but I do not know whether the language is here. The question was raised that the religious program was exempted, not just religious music. It was thought implicit that the music would be religious, but as a matter of fact, it would not have to be. As I understand it, you could use a jazz piece, a classical piece, anything. It would not have to be religious music per se if it were embodied in a religious program.

Ms. RINGER. The music itself has to be of a religious nature. It certainly could be jazz, but it would have to be a jazz mass or something like that. Certainly the popular forms have been used for religious matters.

Let me say that SESAC has a very large catalog of gospel music.

That is exactly what they are concerned about.

Mr. Kastenmeier. It is your recollection of the Senate provision that the music, the piece, the selection itself must be of a religious nature as well as the program in which it is—

Ms. RINGER. Actually, this is in your bill too. This is subsection (c)

of section 112. It has been in the bill for quite a while.

Mr. Kastenmeier Playing nondramatic musical work of a religious

nature, the work itself would have to be of a religious nature.

Ms. RINGER. There is a referrant to that term already in the bill. There has been since—I am not sure of the exact date—but I would certainly say the 1964 or 1965 bill contained a provision in section 110(3) dealing with works of a religious nature performed during services at a place of worship or other religious assembly. And there is some language in the report which emanated from your subcommittee dealing with that very phrase. It is not absolutely self-defining, but I think it expresses about as well as you can, what it had in mind here.

Mr. Kastenmeier. If a particular transmission program were not really sponsored by a religious organization, but embodied a performance of a nondramatic musical work of a religious natur., presumably it would also qualify.

Ms. Ringer. Under 112, they are saying—

Mr. Kastenmeife. 112(c). There is some confusion about that. I just wanted to get it straight in my own mind whether necessarily the religious work—the work would have to be of a religious nature and would also have to be in the context of a so-called religious program.

Ms. RINGER. First of all, the person doing the broadcast, the organization or person doing the broadcast must be a governmental body

or other nonprofit organization. It does not have to be—

Mr. Kastenmeier. For profit?

Ms. Ringer. There is a term used called transmission program which is defined elsewhere in the bill, and it does not have to be of religious nature. It is the use of a nondramatic work of a religious nature. That is the key. The act—I guess this is the basic point—the act that is involved is the making for distribution by a nonprofit organization of a work of a religious nature, of a transmission program incorporating a work of a religious nature. The effort in the drafting is apparently to try to capture the very common situation that is now involved. I think, for example, Billy Graham's program was mentioned during the hearings, where he will go to a studio and tape a program of a religious nature obviously, but incorporating music of a religious nature, and it will be sent out by a nonprofit organization, which in his case, is his own organization, to commercial broadcasters, and he will either pay them to broadcast the thing or will give it to them free.

Mr. KASTENMEIER. I was thinking of the opera "Moses and Aaron."

It simply would qualify—

Ms. RINGER. No; because it is dramatic.

Mr. RAILSBACK. Along the same line, what about modern songs that

have religious themes? I am wondering about those.

Ms. Ringer. First, we are talking about a nonprofit organization making the program and sending it out without any commercial intention, and it is only one. In other words, this cannot be duplicated. I think the basic question is whether or not this is something your committee considers as appropriate as an ephemeral recording within the general rationale of exempting ephemeral recordings up to a point.

The Senate obviously felt it was.

Mr. Railsback. From the payment of mechanical royalties.

Ms. RINGER. Well, no, because I do not think this would be considered a recording under section 115.

- Mr. Railsback. On page 25-

Ms. Ringer. This would be completely exempted. In other words, there would be no licensing, compulsory or otherwise. In other words, the religious organizations that have broadcast subdivisions would be able to continue what they are now doing as a practical matter, which is to use music without paying any royalties for it and without seeking licenses from anyone. SESAC is in a different position from the other performing rights societies on this point because they do not license mechanicals. Those rights are normally held by the Harry Fox agency for the music publishers, except for SESAC. SESAC controls not only performing but also recording rights.

Mr. Kastenmeier. If the gentleman from Illinois has no further

questions, you can continue from there.

Ms. RINGER. Thank you. I hope for the sake of the people who are here for this typeface issue, we can get to this today. I know some of

thêm came for it.

Chapter VII deals with the broad question of works of art and designs, and I would say that on the basis of the testimony before you, the most controversial issue in this whole area is the question of the protection of typeface designs. I have tried in this chapter to review the legislative history of section 113 and title II which tie together. As I have tried to bring out, the history of the design bill as such which has now become title II of the Copyright Revision bill goes back before the current revision effort even began. And, in fact, I was struck by the fact there really was a feeling that the design bill would be enacted before the revision program even got under way. This turned out to be somewhat overly optimistic.

I do not think that anyone beyond a very few people will argue seriously that design patents are satisfactory for the protection of designs today. And I think I can spell out the reasons for this. They

are very real.

Only about 3,600 design patents were issued last year, which I think indicates that not many people feel that they are of great economic value to them for one reason or another. The amazing thing that happened in this whole field is what I will try to summarize very briefly. For genulation after generation, going back to the beginning of World War I, there were efforts to try to find some legal device to protect designs of useful articles. This has been a serious public problem ever since the United States became a major manufacturer of designed goods and an exporter of them. Practically every legal device you can think of was tried at one point or another. It was a very active subject under the NRA odes, for example, which were later held unconstitutional. A lot of emotion was generated on this issue. A lot of lawyers' fees were paid, and the results for the designers or manufacturers who

originated designs were practically zero.

Lurking there all along was a possible interpretation of the copyright law which, under the 1909 statute, protects works of art and other graphic works under language which did not contain a clear-cut answer as to whether or not designs could be protected under the present law. After 40 years of efforts to find other answers, a case began in the Federal courts which eventually reached the Supreme Court in 1954. On March 8, 1954—I am now reading from page 8—the Supreme Court, by a seven to two majority, in Mazer v. Stein, upheld the copyrightability of works of art that had been incorporated as the designs of useful articles. The Court strongly endorsed a Copyright Office regulation accepting as copyrightable works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects were concerned, such as artistic jewelry, enamels, glassware and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings, and sculptures.

The Supreme Court actually, with approbation and with Justices Douglas and Black dissenting, held—and I would like to run down the holdings: That works of art are copyrightable as the writings of an author, that original works of art do not cease to be copyrightable as works of art when they are embodied in useful articles, and for this purpose, the following factors make no difference whatsoever: First, the potential availability of design patent production for the same subject matter. Second, the intention of the artist as to commercial application and mass production of the design. Third, the esthetic value of the design or its total lack thereof. And fourth, the fact that the design in its useful embodiment was mass produced and merchandized commercially on a nationwide scale. Then Justice Reed added a paragraph at the very end of the majority opinion which I think is

worth reading.

I might say in fairness, Mr. Chairman, that Mazer v. Stein did not address the constitutional question. This was not argued in the briefs for reasons that escape me, but it was not. And therefore, this is not a constitutional decision. It is a statutory decision. Yet, in the last paragraph, which I guess would have to be, because of that, considered

dictum, this is what Justice Reed has said:

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights in the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." This following sentence is frequently quoted: "Sacrificial days devoted to such creative activities deserve rewards commenturate with the services rendered."

It is a little hard to think about the sacrificial days that went into the lamp bases that were involved in the Mazer case, but be that as it

may, the point is a more fundamental one.

Now, this was a really revolutionary decision, but it took a while for people who had been headed off in another direction to realize what it

had to offer them. Its reach, the decision in the Mazer case, very clearly went beyond lamp base designs, but did it go so far as to cover all o iginal industrial designs, such as machinery, automobiles, refrigerators, and so forth? The Copyright Office decided after much discussion that for purposes of registration, the following line should be drawn in its regulations which are still in effect, and on page 11 I quote the regulations which are rather extensive, but essentially-and I will read now from page 12—they mean that virtually all original twodimensional designs for useful articles, such as textile fabrics, wallpaper, floor tiles, painted or printed decorations, and so forth, were subject to copyright registration. The same was true of those threedimensional designs that can be conceptually separated and are capable of existing independently of the utilitarian aspects of the article embodying them, such as a lamp base in the form of a human figure, or even as it is later evolved, very abstract designs, but it still can be identified as something that is designed rather than the shape of the article such—other examples are carvings on furniture, costume jewelry, decorator items, and so forth.

The case law on this subject is very very copious, and this first interpretation of the Copyright Office does seem to have been accepted and has not been successfully challenged. During fiscal year 1975, the Patent and Trademark Office issued 3,600 design patents, and the Copyright Office made 9,600 registrations covering designs for useful articles. Although it has substantially expanded the scope of designs subject to copyright registration as "works of art," the *Mazer* case, as interpreted by the courts and the Copyright Office, leaves unprotected a large body of creative work: Three-dimensional designs of utilitarian articles as such, as distinguished from three-dimensional ornamentation or embellishment incorporated in them. These types of designs are theoretically subject to the design patent protection, but for various practical reasons, they are not. Design patents are not extensively sought to cover them. They are really without effective

legal protection.

Mr. Kastenmeier. Now, do I understand there are presently three classes of works here? One, that for which a design patent would be obtained. The second, that for which a design for useful articles would be protected by copyright. And a third, those protected, practicelly speaking, by neither.

Ms. RINGER. There are three classes of articles, but I would probab.

divide them a little differently.

Mr. Kastenmeier. Are they overlapping?

Ms. RINGER. Yes; they are.

Mr. KASTENMEIER. Are there things for which one could get either

copyright protection or patent protection? Take your choice?

Ms. Ringer. Not only there are, but I would say that everything we register in the Copyright Office is as a class, subject to design patent protection. It may not be up to the standards of novelty and nonobviousness that the Patent Office applies to all patents. In other words, the standards are much higher in the process because it requires a novelty search. A prior art search is a very slow and expensive one.

We will not, in the Copyright Office, register the three-dimensional design of a useful article unless something in it can be conceptually identified as a work of art in a very broad sense. The Patent Office will register everything we register and those things too, but only if it meets their standards, and if they are applied for. And the applications have dropped off substantially over the years in the design patent field.

In any case, all this is a result of the *Mazer* case, and the design bill actually started before the *Mazer* case was decided and was based, in its very earliest origins, on the assumption that there was no copyright protection. So it is perfectly clear, Mr. Chairman, that the

situation has changed since then.

But it is our quite strong belief that the design section title of the bill is still needed to cover this additional area of protection which is, in effect, without protection now. And we believe that the approach that has been adopted is valid for some of the material that we are now

registering for copyright.

It is entirely conjectural whether anybody who is now getting full copyright protection, which is upwards of 56 years now, would turn to this title if they have clearly established rights under the copyright law now. Probably not. It took them a long time in years to realize the full copyright was going to be sustained by the courts. But I think it has been sufficiently established, and now that it is they would not turn back to design, sui generis design protection.

Nevertheless, I do believe that the overlap that you speak of between copyright and design protection under title II would be quite substantial and that people might find some advantages in going the title II route rather than the copyright route, even in areas that are

now registering in the Copyright Office.

I think I had better skip over the legislative history going up to the point in the Senate where title I and title II were conjoined. The design bill, as I summarize on page 14, has been pending in one house or the other ever since its initial introduction in 1957. It has been the subject of hearings three times in the Senate and once in the House. On four occasions, it has passed the Senate. On two other occasions, it has been reported favorably by the House and Senate Judiciary Subcommittees and was the subject of a hearing before your subcommittee in December 1963.

I think I will skip now to the discussion of the design part itself, as distinguished from the typetace issue, and come back and deal with the typeface issue separately. I would like to emphasize at this

point that the two are closely related.

This is from page 21. As the law now stands, a large area of designs of useful articles is subject to full copyright protection, while the remainder, consisting of a large body of fine three dimensional designs, is virtually without effective protection. The design bill would remedy this injustice and restore a balance to the level of deserved protection in a field involving a high degree of creativity.

The Copyright Office adheres to its position strongly favoring the enactment of title II of the bill. And we agree with the comments in a letter that NASA sent to the committee about 6 weeks ago indicating that there are some problems of terminology in conjoining these

two in the same piece of legislation. And it is unclear whether the design title would go under title 17 or would float around somewhere

separately. I think that shoud be straightened out.

Section 202 of the design title has been strongly criticized for its failure to protect the shape of wearing apparel. This was a hotly fought issue, and it was a simple case of expediency. The shape of wearing apparel has been cut out of the area of protection of the bill, but this restriction does represent a hard-won compromise, and may well be the reason why there has been no opposition to the bill since 1969, other than the traditional opposition of the Department of Justice, which has opposed separate design legislation from way back before there was a Mazer case.

This is still on the design title.

In the context of protection for typeface designs under title II, questions have been raised as to whether a font is a "useful article" and whether any typeface design can qualify for protection under subsections (b) and (c) of section 202, which are restrictive in the sense of what can be registered as a design. And this is rather hotly argued in the typeface testimony.

In our opinion, there is no question that truly original designs for typefaces can qualify for protection under the design title, and we do not feel that revisions in the definition of "useful article" or the language of section 202 are necessary to achieve this purpose. But this is

basically a technical question and not a substantive one.

The basic substantive questions concerning typeface are obviously

more difficult.

Some technical points were raised by the Commerce Department in its testimony on May 8, concerning whether the design should be required to be made public before registration or the multiple designs could be registered together and whether declarations should be allowed in lieu of the requirement for statements to be made under oath. And the Commerce Department also argued that the \$15 fee is too low, and that the Administrator should have discretion to set the fee at cost. The Copyright Office has no fundamental objection to these suggestions. We do observe, however, that multiple designs should be registrable on a single application only if they bear some discernible relation to each other. As for the fee, we have severe reservations about the Administrator being able to set fees on the basis of costs of operations in cases of this sort, where he could be in a position to subsidize the inefficiency of his own operations. If, as we are recommendingand I am coming to this difficult recommendation—administration of the design operation is entrusted to the Copyright Office, the design fee should bear some relation to standard copyright fees.

A point raised by the Patent Office and representatives of typographers was supported by Alan Latman in his testimony, has to do with the possibility of maintaining an action for infringement without a certificate of registration. The Copyright Office has no objection to tightening this provision to prevent maintenance of suit in the absence

of a certificate of registration.

The question of where the design title should be administered is unanswered in the bill, but some expectation has been expressed that the

Administrator would be the Commissioner of Patents or a subordinate official of the Patent Office. There were, in fact, some informal discussions of this possibility over 20 years ago. In the light of the *Mazer* decision and the extremely close relationship between copyright and design registration, the Copyright Office now feels strongly that administration of the design title should be in the Copyright Office.

Both the Department of Justice and NASA raise questions concerning the Government suit provision which allows the U.S. Government to be sued for design infringement. We agree with the suggestions advanced by NASA for technical improvements, but we do not really agree with the Justice Department's concern about possible difficulties for Government procurement under this provision.

We do not see that designs are any different from any other pro-

tected material for this purpose.

I should add a final point which I forgot, frankly, when I wrote this

section of the report, Mr. Chairman.

A question was raised as to the length of the term which is now 5 years, for the renewal, one single renewal of 5 years, under title II. This was a compromise which was achieved, I would say, roughly in about 1953. It is inconsistent with the International Convention, which we do not belong to but which we could belong to if this were passed. And I believe that we should add an additional renewal term of 5 years. I do not see any public policy argument against it. The design patents now last for 14 years, and it would certainly make it possible for us to join an International Convention that we would not otherwise be able to join.

I have a section in here about calligraphy, which is kind of a bridge between a basic work-of-art design question and the typeface question. I merely say on this point that we believe that we may have been wrong in not accepting calligraphy unless accompanied by illuminated letters, orname, tal borders, pictorial embossing, and the like. We have come to the conclusion that calligraphy is an art form, a traditional, genuine art form, and that it should be registered assuming that it

meets our formal requirements.

However, the calligraphers raised another question which has been a point of issue in some of the discussions in the Senate as to whether or not they should not have a right to use copyrighted material in the works that they letter. In other words, that they should be able to take a copyrighte I poem and because of the fact that they are making it into a calligraphic work, they should be able to use it without permission or payment. And essentially, what we are saying is this should be handled by fair use, and they should not have a specific exemption.

The basic question in typeface—and I regret this comes so late in the morning, but I would hope that we could get through this if possible, Mr. Chairman—is discussed on page 15, in which I quote at length from the letter I sent to you on June 6, 1975, explaining why this has become such an issue in copyright law under the present law.

We are now being importuned to make registration as works of art for original designs for the individua. ...ter forms in an alphabet. We believe this has become more of an issue than it had been because of the increasing use of photocomposition which vastly simplifies the exigencies which now exist in the designing of typefaces and makes it

possible for many more variations and a good deal more originality to be applied than could be applied when you have to work within

the confines of a metal slug.

In any case, without burdening you with the full letter, you did, with my gratitude, hold a hearing on September 17, 1975, which dealt with this problem in the context of the revision bill. And this followed in many respects the hearing that I held the previous November in

which this same sharp controversy was presented.

I am now on page 18. Proponents of typeface design protection argued that new photocomposition techniques have made unauthorized copying of typefaces an urgent problem, that original designs for fonts of type are the writings of an author in both the constitutional and statutory sense, that no case law in any field rules out their copyrightability, that registration for typeface designs would impose no burden on authors and reprinters, and that both titles I and II of the revision bill should be amended to make clear that typeface designs can be considered original and that fonts of 'ype are useful articles. They also recommended that the term of protection under the design bill be extended to 15 years, and I would recommend doing that, as I have done, but for other reasons—besides just typeface—in other words, to conform to international standards.

Opponents argued that neither title I nor title II of the bill as drafted protects typeface designs; they opposed any amendment of title I to bring typeface designs within the scope of traditional copyright protection, and they stated that title II would be inappropriate without "very extensive amendment including mandatory licensing at reasonable rates." They argued that the issue is not one of "typeface piracy," so to speak, but of creating exclusive rights for a few big manufacturers, who would use them to enforce tying arrangements between their machines and fonts. Concern was expressed by a representative of magazine publishers lest recognition of exclusive rights might lead to suits to enjoin publication of printed matter. Representatives of typographers and the American Institute of Graphic Arts expressed concern about the danger of excessive protection that would foreclose the use of certain typefaces.

Since that hearing, the director of typographical development for the Mergenthaler Linotype Co., Mr. Parker, has reiterated a point that he made in the hearings but which may not have attracted your attention. It was that Mergenthaler—and I would assume that this same view is held by other manufacturers who do develop and buy original typeface designs—had no objection to compulsory licensing

of protected typeface designs at a reasonable fee.

And he also made clear, as he had at the hearing, that Mergenthaler seeks only to protect original typeface designs from unauthorized use to make means for composing text, and from such unauthorized means being used to compose a page of text, and has no intention of seeking rights against publishers and authors or in the composed page as such.

I have also received a letter from Mergenthaler's attorney here in Washington, Henry Leeds, who has urged us to go on and make a decision under the present law with respect to the pending application—it has been pending for a long time now while all of this has been going on—and suggesting, I think—the letter is here, and you can judge it for

yourself, but I think it is a fair interpretation to say—suggesting that we will be sued in mandamus to insist that we register the original design, unless we decide the case favorably and change our regulations, which I think we have said all along we would have to do if we were going to do this.

Let me come now to the recommendations that I have on this very

difficult problem. This is beginning on page 26...

The issue of protection for original typeface designs under the present law, or title I of the revision bill, which is the copyright part, or the design act embodied in title II, is one of extraordinary difficulty and complexity. In view of the consistent tradition in the Cepyright Office in opposition to the registration of any typeface designs, the long-standing interpretation of the Office's regulations to this effect, and the many doubts raised at the Copyright Office hearing on the subject, it is our view that registration under the present law should be made only on the basis of a clear-cut judicial decision.

And as I have suggested, this may be forthcoming.

The testimony at the House hearings on July 17, 1975 suggested that, underneath the sharp arguments, there may be an underlying basis of agreement. It seems possible that, if the bill were amended to foreclose copyright protection for typeface designs under title I and to make clear the availability of protection under title II, the various positions might be accommodated if: first, liability were clearly restricted to the unauthorized duplication of the design in the manufacture of fonts, matrixes, and so forth, and if printers, authors, publishers, et cetera, were clearly freed from any risk of liability; and second, that a compulsory licensing system were established under title II, allowing anyone to a naufacture a font, et cetera, reproducing a protected typeface design on payment of a reasonable fee.

We see many similarities here, Mr. Chairman, to the situation that existed when the compulsory license was created for sound recordings in 1909: The claim of monopoly which has been very strongly arged and the recognition that here was something that needs to be protected, that deserves to be protected, but if you do protect it, there will be some economic consequences. This proposal would obviously require careful elaboration as to content, form and procedure. However, the Copyright Office considers this the best method of resolving an important and difficult problem and would, with your help, do its best to con-

tribute to a productive result.

Mr. KASTENMEIER. Thank you, Ms. Ringer. Just one or two questions

before we close today.

I am chagrined by the fact that there are so many other ongoing competitive legislative enterprises taking place this morning that we do not have all our colleagues present.

I do agree that if we were to protect typeface designs, it ought to be under title II rather than under title I, and we ought to make that

clear. At least that is my offhand judgment.

I am not entirely clear which the printers, authors, publishers should be freed from any risk of liability. Precisely what connection might they——

Ms. RINGER. The concern that was expressed by Mr. Wasserstrom here and also at the hearing I held in the Copyright Office in Novem-

ber of 1974—and I might add that the same concern was expressed very forcefully by Irvin Karp at the Copyright Office hearing—was that if you had in hand a certificate of registration for a typeface design under the present copyright law, the typeface design owner could bring an action to enjoin publication of a book or magazine that had been printed from an unauthorized copy of that typeface design.

In other words, there is a good deal of copying going on in this field, and the author and publisher would have no way of knowing whether or not—and in some cases, I would suspect the printer would not necessarily know—whether the typeface design he has is actually original or not. And in any case, the authors and publishers should

not be faced with that kind of danger.

Now, the proponents of typeface design protection have argued that at no time did they ever dream of such a thing, but one of the reasons that have made me very cautious about amending the Copyright Office regulations under the present law, one of the things among others, is the fact that I, as Register of Copyrights, cannot in any way guarantee that the authors and publishers would be safe from this kind of liability.

In my opinion, a court faced with this problem would hold in their favor, and would say that protection covers only the making of other fonts and not the using of an unauthorized font to print something. And yet I cannot guarantee that that would be the result. The law

is not that clear.

I think this is one of the advantages of trying to deal with this in

the current legislative effort to try to make that clear.

Mr. Kastenmeier. I agree. I think it is rather complex. I do not know to what extent we will have a competent technical understanding of this area, partly because it is—within the industry, it may be

understood, but to the general public, it may not be.

Turning to the compulsory licensing system, you do feel that here. compulsory licensing is appropriate, that there be a compulsory license if he, in fact—the original designer and manufacturer licensed anyone else. Then at that point, it becomes compulsory. Or is it—or if he licenses no one, does it immediately—is it once used?

Ms. Ringer. The way the industry works, you have got to license somebody in order to commercially exploit their font, and there has to be some sort of trigger—I think this is true of all compulsory licensing systems—that brings it into operation and makes the reproduction of the font available to other manufacturers under stated conditions. I do not know exactly what the trigger would be. It might well be the issuance of the first license, but there might be some other act, perhaps earlier, that would bring it into effect, like the publication of advertisements reproducing the font.

Mr. Kastenmeier. We actually do not have such language.

Ms. Ringer. No; let me say, Mr. Chairman, this is one of the most hotly contested issues I have had to deal with recently, and I would not dream of putting forward a compulsory licensing proposal independently, but it has been suggested by one of the principal proponents. of protection in this area. In other words, in trying to establish a ground rule, I think this is not something we should ignore.

Mr. Kastenmeter. On that note, we will conclude this morning's.

efforts. The committee is very grateful to you.

Our next meeting, which may or may not be the last meeting, will be Thursday, November 13, at 10 a.m. We will make a substantial effort at that point to have the members here so they can be here for our last project.

That concludes this morning's session. The committee is adjourned. [Whereupon, at 12:20 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Thursday, November 20, 1975.]

COPYRIGHT LAW REVISION

THURSDAY, NOVEMBER 20, 1975

House of Representatives,
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
of the Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, Pattison, and

Wiggins.

Also present: Herbert Fuchs, counsel, and Thomas E. Mooney, associate counsel.

Mr. Kastenmeier. The hearing will come to order.

We have met this morning to hear further from Ms. Barbara Ringer, the Register of Copyrights, in what we hope will be the next to the last installment of her testimony and our Subcommittee's hearings on H.R. 2223, the copyright law revision bill.

We have scheduled the next hearing and possibly the last hearing on

Thursday, December 4.

So with that, Ms. Ringer, you may proceed where you left off some 2 or 3 weeks ago.

TESTIMONY OF BARBARA RINGER, REGISTER OF COPYRIGHTS— Resumed

Ms. RINGER. I will do so.

I must apologize for skipping over chapter 8 which would normally come next in the material I am presenting. It deals with section 114 on rights in sound recordings and the Danielson bill, which is the performance royalty provision of the bill. It is a difficult chapter, and I have been having some trouble with it. I have not finished it. Since it also ties in with an important issue under Section 301, involving the Federal preemption of sound recordings fixed before February 15, 1972. I would rather like to present these two together in the interest of comprehensibility.

You have before you four chapters which I hope to be able to get through today. For reference, they are chapter 9 on the compulsory license section, 115; chapter 10 on the jukebox provision, section 116; chapter 11 on ownership and transfer of copyright, which is chapter 2 of the Bill; and chapter 14, on the manufacturing clause, chapter

6 of the bill.

Starting with chapter 9 dealing with what is known familiarly as the "mechanical royalty," I think we can identify five questions, which I will try to address in order. The first is whether or not to retain the compulsory license for the making of sound recordings at all.

Second is an intriguing question involving the availability of the compulsory license under the copyright law with respect to music as

used by the so-called record pirates or tape duplicators.

Third is the basis of the royalty and the procedural provisions of

section 115.

Fourth is the basis of the royalty rate, which can be characterized as a percentage or a flat rate.

And, finally, the all-important question of the amount of the

royalty.

Starting with chapter 9, I would like to read bits and pieces, as I have been doing, and I will try to identify the page for the sake

of the reporter as I go along.

The first issue is, Should the basic compulsory licensing system, established in the 1909 act to govern the manufacture and distribution of phonorecords of music, be retained? And at some length in this chapter I have traced the legislative history of section 115. This is the bulk of the chapter, pages 3 to 21, and let me try to summarize the

contents of that very briefly, if I can.

Section 1(e) of the present law is the great-granddaddy of all compulsory licensing systems. I do not think that is an overstatement. It sounds rather broad, but the compulsory licensing provisions of the 1909 statute were actually an imaginative effort to compromise a difficult problem and they represent a daring legislative innovation of historic significance. Section 1(e) of the 1909 act established the first compulsory licensing system in any copyright or patent statute, in any intellectual or industrial property statute or, as far as anyone seems to know, in any statute in the world. It set a pattern that has been widely followed in other countries in copyright laws as well as other fields, and has had a profound effect on the development of the music industry in the United States.

Mr. Kastenmeier. Ms. Ringer, I just want to say, I am glad you are dealing with this. One of the questions I think people new to copyright law have, and I do not mean to say that critically, but in a fresh approach—and I have noticed this among conversations with members of the committee—whether or not it is possible and practicable to retreat from a compulsory license. In other words, it tends to represent not only innovation but a device which proceeds out of other

things, an evolution to the present state.

Is it possible to rewrite the law so as to disengage from a compulsory license? I think some members have that question in their minds.

Ms. Ringer. I think it is an absolutely essential question for you to answer, Mr. Chairman. I have tried to trace the history of the provision and the attitudes which evolved since the middle 1950's in an effort to show how the Copyright Office went through the same mental process that you are going through, how your subcommittee in 1966, 1967—1965, 1966—when through the same mental process, and how you need to go through it again. I think it is an absolutely essential question. It is not given, in my opinion, that the compulsory license must remain forever and ever. I think that once—I have traced this in

a very general way—I think you will see how we came to the point where we now are down to 2½, 3 cents type of discussions, but I do not think we can get to that type of discussion until we have addressed the

more general questions. I certainly agree with you.

What I am trying to say now is that this was essentially an antitrust measure, attempting to create exclusive rights which were considered just in 1909, the right of the composer or an author of music or a music publisher to have rights against those who were recording his music, then on piano rolls, primarily, but without creating a monopoly in the music industry. And this was because of the particular situation that

existed in 1909, and I do go into this briefly here.

There was one company, to make a long story short, that had bought up sound recording rights and musical compositions in anticipation that Congress would change the law, and Congress was thus faced with the prospect that, if it granted exclusive rights with no restrictions, it would be creating an automatic monopoly in the Aeolian Co., which was this big, piano roll manufacturer that had succeeded in getting licenses. And they did not feel they could do that. And their response—while the section is poorly drafted, at least looking at it from the vantage point of 70 years later; nevertheless, it was, I think, an imaginative effort. And if you look at the hearings in 1909, 1906, and 1908, actually the bulk of the testimony was on this issue. This was the big issue in the 1909 law.

I do not think I need to emphasize the point that obviously the phonograph industry went through enormous ups and downs with the technological developments of the 20th century, but lying there in the background all the way through it was the compulsory license, and in many ways the music industry in the United States was built up with

the compulsory license there.

Now, in 1961, obviously the whole industry had been transformed, and it was difficult and is difficult to justify compulsory license simply out of hand, simply by itself. A compulsory license has to be a compromise of some sort. And the industry had changed so radically that the Copyright Office felt that there might be a possibility of doing away with the compulsory license and, therefore, in our recommendations in the Register's report in 1961 we recommended that the clause be done away with altogether and that licensin; of sound recordings, music licensing of sound recordings, be left to free negotiation.

We did hedge our proposal because we recognized how radical this was, and we recommended that if the clause were retained, that it be

thoroughly overhauled.

Now, as I tried to bring out in these first 20 or so pages of the chapter, there was a storm of controversy after this, and without going into—I will not read, I will try to summarize. The record industry mounted a major campaign against repeal, and their basic argument was economic. But they argued similarly that the laws for the compulsory license would produce the same kind of result that was sought to be avoided in 1909, basically that it would lead to concentration and monopoly problems and would raise the cost of records to consumers.

There was something else, though, and I think this needs to be emphasized. The music industry itself was obviously uneasy about

what would happen to it—I am talking now about authors and publishers and performing rights organizations. Publicly, obviously, they were in favor of repeal, but I think that I can say without any fear of contradiction that privately they were concerned about what it would do to them. It was obviously going to lead to restructuring. This was laid so firmly at the basis of the music industry that I feel, as we said in the 1965 report, they would rather bear what ills they had than fly to others that they know not of. And that was really the prevailing sentiment.

In any case, it became apparent that some sort of compromise was going to be necessary, and these things do become apparent to you along the way, and we put forward various alternatives. Up through 1964 we stuck with an outright repeal, and our preliminary draft had an alternative that was an outright repeal with some softening aspects

to it. The other alternative was a compulsory license.

Now, at this point a very major role in the compromise procedure was played by a subcommittee of the American Bar Association. I think there are a few people that remember this or know this. But it is true that there was a subcommittee made up of representatives of the record industry, the music publishers, and others in the field, who did try to take what we were doing and produce a compromise. It was tripartite, or perhaps even multipartite, and they did produce a compromise which involved, among other things, 3 cents or 1 cent per minute of playing time. And for purposes of this discussion this morning, Mr. Chairman, I am going to not worry about the minute playing time; I will just talk about cents per song.

This subcommittee—and there were many discussions going on around this at the time—did agree upon a formula for section 115 as a whole, and it also agreed upon this 3 cents flat rate type of approach.

By 1965 the question was not whether, but how much.

The revised language and structure of section 115 was accepted by both sides, but having gotten that far, the record industry then mounted a major campaign to bring the rate down. They went forward with economic studies in a major effort to try to prove that a 2-cent rate was satisfactory and that any raise would not be justified or fair. As you well know, Mr. Chairman, the House subcommittee in 1965 and the Senate subcommittee later in 1967 had literally an avalanche of statistical material presented to it, together with data and arguments and even audiovisual performances, and the basic result was that the concentration of the subcommittee was on the fee.

But I think, going back to your initial question, Mr. Chairman, it is fair to say that the House Judiciary Subcommittee in 1966 and 1967 did make a very thorough review of the basic question of whether or not the compulsory license should be retained. And if I may turn to page 11, these are the conclusions that it reached then. The arguments pro and con are laid out in the preceding pages. From these arguments, after reviewing them, and from the array of economic data presented to it in connection with the rate, the committee concluded that a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted music. The committee also concluded, however, that

the present system is unfair and unnecessarily burdensome on copy-

right owners and that the present statutory rate is too low.

A central agreement that we had with that position I think is stated on page 36, and the tone of this statement is admittedly a little rueful. But let me read it in any case.

In view of the failure of the Copyright Office's 1961 proposal to eliminate the compulsory licensing system for recording copyrighted music and the developments since then, one thing seems certain: The compulsory license has taken solid root in U.S. copyright law. We are past the point of talking about free negotiations in this area. However, Congress must consider the extent to which any real negotiations under a rate ceiling would be realistically possible.

Now, this is my conclusion, Mr. Chairman. I do not find it a very happy one, but it is the basic conclusion on the question that you had.

The next, second issue is a somewhat surprising one, and I do not think you have heard any direct testimony on it, although it was certainly referred to several times in the testimony that you had from

the tape duplicators.

The basic question—this is discussed on pages 21 to 26, and it is whether under the compusory licensing provisions of section 1(e) of the present law or under 115 of the revised law, can a manufacturer who is duplicating someone else's recording without authorization go through the compulsory licensing mechanism in the statute and secure a compulsory license for the music? He is going ahead and duplicating someone else's record, but can be legalize his use of the music by going through the compulsory licensing procedure?

Now, this is kind of a fascinating case study. There was, by the way, a 1912 direct decision on this in Federal court, and the plaintiff was the Acolian Co., who had been the big bugaboo in 1909—and I think this is on page 22. It starts on 21. This is pages 21 to 26 that I am now

dealing with.

The court held in favor of the Aeolian Co., saying that the provision in the present law that the compulsory licensee can only make similar use of the copyrighted musical composition did not mean that they could duplicate somebody else's piano roll or recording—they even said recording—but, to quote the judge—

* * * must resort to the copyrighted composition or sheet music and not pirate the work of a competitor who has made an original perforated roll.

Now, this is one of those cases that has sat there for generation after generation, and people knew about it and I think they regarded it as kind of a biological sport. As I said on page 22, although the *Aeolian* decision seemed to open an inviting door to both copyright owners and record producers for the protection of recorded music, it was 60 years before anyone walked through it. And, one of those unexplained mysteries of U.S. copyright law, the *Aeolian* case lay dormant, neither cited nor overruled, for generations, during which efforts to obtain legislation against record piracy went for naught, and the result of efforts to obtain judicial relief on other theories were problematical, at best.

Finally, in 1972, at almost the same time Congress recognized sound recordings as copyrightable subject matter and gave performers and record producers protection against unauthorized duplication, the

courts started holding that a compulsory license under section 1(e) of the 1909 copyright law gives the compulsory licensee only the right to make similar use of a copyright work and that similar use does not

include the duplication of someone else's recording.

Now, at pages 22 to 24 I review these decisions and I do not want to go into a lot of detail over them. There are four circuit courts of appeals that with split decisions, and in many cases reversing lower courts, have held as the *Acolian* case did. One of these cases—well, all of them went to the Supreme Court on petitions for writs of certiorari. On one of them the Supreme Court asked the Justice Department to make comments, and the comments were, essentially, "do not grant certiorari; in effect, the 1972 amendment has taken care of this, and four circuit Courts of Appeals have held all along the way." So the Supreme Court denied certiorari in this case. And this issue seems about as settled as these things ever are without a definitive Supreme Court decision.

And as a result, whether you agree with this or not—and I am inclined to, more or less—I think that it is certainly debatable. It does not shake me up as a matter of principle. I am inclined to think that this should be written into the statute.

Now, the Senate did, but it was before the Supreme Court action in denying certiorari in this one case and before it was really quite as settled as it is now, and I have some qualifications about the language that the Senate has used in two shots at this problem, in trying to express this principle, and what I am really concluding—and I will read this conclusion, which I think is on page 37—is, essentially, that the Senate approach of trying to write this into the statute is a good one but we should take another look at the language.

The Copyright Office agrees that Section 115 should deal with the question of whether a person who duplicates a particular sound recording of a copyrighted musical work without a negotiated license from anyone should be able to rely on a compulsory license as far as the music is concerned. In view of the solid authority provided by these four cases, we also agree that the compulsory license should be precluded where the sound recovering reproducing musical composition is an unauthorized duplication of a recording already in existence However, we believe that the language of the last sentence of Section 115(a) (1) both in its original form and as amended by the Senate Judiciary Committee needs some substantial-redrafting to express its purpose.

If I may go on to the third question, which is the basis of the royalty and the procedures for working the compulsory license, let me read the questions from page 1. This is question 2, parts B and C

Assuming that you have a compulsory license, should the basis of the royalty be the number of phonorecords made or the number manufactured and distributed; and, second, what formality should be required for obtaining a compulsory license and for making payments and accounting under it?

The fundamental question here—it is still a very lively one—is whether or not the amount to be paid on records under a compulsory license should deal in the number that the compulsory licensee makes at the outset or the number that he is able to sell finally. The background of this issue is laid out in part in the first part of the chapter, in the legislative history part, and is discussed specifically at pages 27 to 30, and I will try to make a long story short on this. It has been up and down and sideways several times.

The present law requires the 2 cents to be paid on every record manufactured, but practically all of the licenses are negotiated, and one of the main provisions of the standard license form for a negotiated license is that you pay on the records sold, not on the records manufactured. But this is under a negotiated license where there is

a contractual relationship.

An early generation of negotiators, the ones that were operating when the subcommittee of the ABA was considering the problem in the early 1960's, early on had agreed to keep the 1909 approach; in other words, to have the royalty applicable under the compulsory license to records manufactured whether they were sold or not, but agreed to ease up on the procedural obligations of a compulsory licensee, which were very onerous, and which were also excused or liberalized in the negotiated licenses under the 1909 act, as I show here on this table on page 27. You had to have monthly reporting, and the report had to be under oath, if required by the copyright owner, and in the various versions of the bill that have emerged since 1963, the approach up to the Senate consideration of this in recent years—

Mr. Kastenmeier. How does this accord with other practices, as far as rate relationship between those who manufacture—whether they are books or otherwise—and pay royalties on, whether the number of books published or the number of books distributed and sold, or any other forms of mass produced, copyrighted material for which there is a license, either compulsory or otherwise? How does this accord with that, as to whether it is manufactured or manufactured and

distributed?

Ms. Ringer. This is the only compulsory license that involves the unit sale of a chattel or whatever you want to call it, so there is nothing to compare it with in the copyright law. Under negotiated license, it is normally the number sold, but it is a negotiated thing, and obviously, many, many contracts contain provisions dealing with returns. In other words, if there is a danger—and this is one of the points I am coming to—if there is a danger that the returns will get back into the channels of commerce, then you should have some handle on getting paid for it, and this is what this hassle is all about right now.

I think you heard testimony on something called cutouts, which is a phenomenon of the moment, and I think this is what we are really

arguing about on this issue.

Mr. Kastenmeier. Does the word distributed—that does not mean sold?

Ms. Ringer. Yes, but of course, you can distribute a lot of records without selling them, and a lot are what are the so-called freebies, and maybe there is another term for it in this decade—I do not know. In any case, the House did accept the compromise that did involve requiring a compulsory licensee who has no permission from anyone and just goes ahead and records under a statutory scheme, to pay for everything he makes at the outset. And this was justified in your report.

In the Senate later, an issue was made, because I think there is a very large practice in the record industry of manufacturing a good deal more than you expect to sell and then taking them back as what they call cutouts. And the music publishers were very concerned about the

danger, which was real, of the cutouts getting back into the channels of commerce, either in this country or abroad. And there was an issue drawn about this in the Senate, and Senator McClellan did ask the respective protagonists on this issue to try to get together and work out a compromise, and the compromise is embodied in the revision bill, as it—I think as it now exists. Yes, that is in here.

The new compromise is just the reverse. The 2 cents or 2½ cents or 3 cents, or whatever, is paid only on records manufactured and distributed. But the reporting procedures, the accounting procedures are substantially increased, the idea being that, all right, we will only require you to pay on records that you manage to sell, but we will insist on very heavy reporting and accounting procedures to make sure that you are not selling these cutouts on the side. And this is a matter of some concern to me. I will try to explain why by reading from pages 37 to 38.

Mr. Wiggins. Mr. Chairman, may I interrupt?

Mr. Kastenmeier. Yes; of course.

Mr. Wiggins. I do not know whether to share your concern or not, because it is my impression that whatever the law may be, it is subject to negotiation. It is within the power of the parties, at least, to negotiate different terms and the conditions agreeable to them. And I am under the impression that the negotiation is always down from the statutory language and never up.

Ms. RINGER. Right.

Mr. Wiccins. If Congress really means to reflect sound public policy that certain things occur, we ought to be talking about minimum mandatory conditions and let the parties negotiate up if they wish, but not below that, which is understood to be good policy. And at some point, I hope you will talk about this question which troubles me. And I view it as whether we should establish floors or ceilings, and I hope at some point you will address this.

Ms. Ringer. I agree with you, Mr. Wiggins. Actually, in this context, you base the payment on records made, because you have always got to make something before you can sell it, so that the copyright owner is going to get more from the compulsory licensee if the payment is based on the records made and not just sold. And it seems to me that that is consistent with your position. I will get to this question of the ceiling.

In trying to express my concerns here, I do not want to lead you to think that this is an irreconcilable difference. I think that there is a way

out of this, which I will try to explain.

The Copyright Office has considerable misgivings about the changes with respect to the basis of royalty and the accounting procedures in section 116, since passage of the 1967 bill. I make the point of the substitution of the word "manufacture," but I do not think that is very important. More important, we remain convinced that, as stated in the House reports of 1966 and 1967, a recordmaker should not be free to reproduce as many phonorecords as he wishes without any permission from or obligation to the copyright owner, and then to pay a royalty only with respect to the phonorecords he eventually distributes to the public.

Moreover, as I have been trying to say, although the testimony before the committee on the question of cutouts was put forward by

tape duplicators rather than copyright owners, we believe that the problem is a real one and should not be ignored. It is unclear whether the royalty to be paid on final records distributed includes payments for phonorecords that have entered the stream of commerce, have been returned or cut out, supposedly to be destroyed, but which are known on occasion to reenter the stream of commerce. These records and tapes certainly should be paid for before they leave the compulsory licensee's hands.

The tradeoff for basing royalties on records distributed is the imposition of unrealistic accounting and certification requirements which a large record company might be able to observe, but which would be extraordinarily onerous and expensive for small record producers. I tried to lay some basis for this conclusion earlier in the paper.

The Copyright Office believes that section 115 of the 1967 House bill represented a reasonable procedural reform of the 1909 compul-

sory license, and we prefer its approach.

Now, if I may, this was distributed several weeks ago, and after it was distributed, I was taken to task in a friendly way by one of the protagonists of the compromise, because they had been asked to make a compromise, by Senator McClellan, and they had made a compromise, and here I was knocking it. I will stick with what I said, but I will throw out another possibility which it seems to me maybe would solve the problem. You could base the royalty on records made and distributed, but refer specifically to the problem of returns, and he negotiated licenses do in other fields. I am talking about the cutous at the course of the records sold, and a clear-cut accounting for the disposition of the difference.

I think that is what they were searching for when they put in these rather Draconian procedural requirements, and I do not really think it is practical to require a small record company to make monthly accountings and hire a CPA to certify each one. This seems a little unrealistic. I think most record productions would agree with this, and

you have testimony to that effect, with which I agree.

If I may go on the fourth question, I can dispose of that rather quickly. This is the basis for the royalty rate and the question which is item 2D at the top of page 2. "Should the amount of the royalty be based on a fixed monetary amount per phonorecord, or should it be a fixed percentage of the price of the phonorecord?" And there is a good deal in the earlier part of this chapter about the history of this issue in the Senate. It was considered here, but not in any great detail, because at that point, it was not being urged by anyone. Later on, it was put forward as an alternative to the 2½-cent rate that you came forth with in 1967. And Senator Hart actually did introduce a formal amendment setting up an 8-percent royalty, 8 percent on the retail selling price. This did not go, and I think we have gotten past this in the discussions.

But let me read what I say here on pages 39 and 40. A royalty rate basis involving a percentage of selling price is, at least en its face, a fairer and more flexible approach than a flat rate per record. It is the approach followed in other countries that have adopted compulsory licensing systems, but it really should be recognized that

they work differently there, because there, almost all of the—well, not almost all, a great many records are produced under the compulsory license. This is not the case here. The compulsory license sets the parameters, but almost all records are produced under negotiated license. Elsewhere, their compulsory license is vigorously used, and there are bodies, Government bodies, that regulate them. And in that type of situation, I think it is easier to have a percentage that would be fairly administered.

Moreover, I think that the pricing of records is more orderly in other

countries than it is here.

The time may come when patterns in the music industry and the legal and administrative framework in which they operate make it advisable to shift from a flat rate per record to a percentage of price,

but it does seem clear that this time has not yet arrived.

So, if I may, I would like to come to the final and most difficult question of what the rate per record should be, assuming all of these other givens. The 1909 law provides for 2 cents; the 1965 bill, which was supposed to be a compromise, provided for 3; the House bill, which is the bill reported by your committee, Mr. Chairman, in both 1966 and 1967 and also the bill that passed the House in 1967 compromised at 2½ cents. The Senate brought it back up to 3 cents in 1974, and that is what is the fee in the bill you have before you.

However, this year, the Senate Judiciary committee on October 7 last month knocked it back to 2½ cents. So our conclusions on this delightful question are stated on pages 40 to 46. It is a rather long con-

clusion, but it is a very difficult question.

Let me read our basic position, and then try to endorse pretty much the principles that your subcommittee adopted in 1967 as a way of approaching this. Our basic position is that the royalty rate should be a statutory rate, at the high end of a range. Thin which the parties can negotiate now and in the future for actual payment of a rate that reflects market values at that time. It should not be so high, however, as to make it economically impractical for record producers to invoke the compulsory license if negotiations fail. This was our position in

1965, and I think it still remains our position.

You, in your reports in 1966 and 1967 also said something with which we agree. In the significant debate over whether the statutory fee is a ceiling or a rate, there appears to be some validity to the arguments on both sides. The ree is certainly a ceiling, in the sense that no higher amounts are ever paid, I at the record producers may well be right in asserting that the statutory fee establishes a base with stereotyped variations downward that for practical business reasons is used as the rate in most written agreements. In this sense, there may be relatively few negotiated agreements in the real sense of the term, but this does not necessarily mean that if the statutory maximum were increased somewhat, the prevailing rate structure would immediately be increased the maximum without negotiations.

Obviously, if you peg the fee higher, there will be negotiations, because c erything is at 2 cents or below, and as far as existing negotiated licenses are concerned, it will remain at 2 cents. This point has

been made, but I think it needs to be made again.

Operating on these premises, the House Judiciary Subcommittee in 1966 undertook a thorough analysis of the testimony and statistical data that had been presented to it at the 1965 hearings and that it had been able to collect on its own. It concluded that 2 cents was too low, that 3 cents would be too high. It adopted 2½ cents, but not necessarily as the prevailing rate now or in the future. The 1966 and 1967 House reports emphasized that the half-cent increase is intended merely to widen the copyright owner's bargaining range, without destroying the value of compulsory licensing to record producers.

destroying the value of compulsory licensing to record producers. This issue, needless to say, was immediately transmitted to the Senate, which was having hearings at the time the House passed the bill, and the Senate engaged the Congressional Research Service of the Library of Congress to make a study of all of the testimony that had been presented in both Houses. And the House subcommittee's response to the testimony it had heard, and 113 page report dated June 30, 1969, was prepared by an analyst in the Congressional Research Service, and he concluded, to paraphrase his statement, that the data was insufficient to draw a real conclusion from. He said this study has attempted to evaluate whether or not the Congress has the information it needs to render a final judgment on the mechanical royalty controversy. Unfortunately, it must be said that the findings to date remain inconclusive.

Specifically, he made two points directed rather pointedly at both sides. He said first, that the record industry, which opposes any increase in the current mechanical rate ceiling, has not provided the Congress with a complete and meaningful picture of its financial condition. And second, similarly, the music publishers and the composers they represent, who advocate an increase in the ceiling rate have demonstrated a clear reluctance to provide the Congress with the type of financial information that will be needed to evaluate that position.

And this, I think, was not intended in a pejorative way. It was just a statement of his conclusions, which I think were probably correct. He recommended additional independent factfinding, and identified two principal areas of inquiry that should be thoroughly explored before a definitive conclusion was reached; first, the obtaining of complete, definitive, accurate information about all aspects of the financial characteristics of the music recording industry, using the following guidelines, and he listed three which I have got here on page 43, and they reflect his criticism of the value of the statistics that the record industry put forth. And the second, obtaining full knowledge of the many important changes that have taken place in the economic structure of the music publishing and recording business since the end of World War II, and particularly since the middle 1950's, with special attention to certain economic implications which he enumerated, and they are on page 44.

I think this was in 1969, and believe it or not, the record industry, the business has changed substantially since 1969, and you would have

to add or elaborate on these criteria.

After reviewing the Knight report and the various economic data submitted to it during and after 1967, the Senate subcommittee reported the revision bill, as you had, with the rate pegged at 2½ cents.

Then—and I have tried to document this in the paper, an effort was made in the Senate to get the rate raised, simply on the ground of inflation, that is 2½ cents was a fair rate in 1967 or 1969, then certainly more, just on the simple basis of inflation, would be fair today.

Apparently accepting this inflation argument, the full Senate Judiciary Committee raised the rate back up to 3 cents in 1974, and the bill passed the Senate on September 9, 1974, with the 3 cent rate which was carried over into your bills, and it has just now been knocked back to 2½ cents in the Senate Judiciary Committee.

If I may, I would like to read from page 45. It is obviously much

If I may, I would like to read from page 45. It is obviously much too late in the game for Congress to undertake the kind of thoroughgoing review urged by the Knight report. Moreover, the bill, in its present form, creates a copyright royalty tribunal which, for the future, could undertake the kind of exhaustive study Mr. Knight con-

templated, particularly if it were given subpens power.

However, Congress must decide now on the specific fee that the tribunal will be reviewing later. The Copyright Office believes that the 2½-½-cent-per-minute adopted by the House of Representatives in 1967 was well thought out and fair in 1967. We take no position as to whether it is sufficient in 1975, because the copious testimony and data submitted to the House subcommittee on September 11, 1975, is in sharp conflict and by itself does not provide a sufficient basis for a definitive conclusion.

Let me add here, Mr. Chairman, that I am not really saying that it is impossible—I am not sure I agree with Knight that you need to, for our purposes, to be comfortable with a rate, to go into an enormous economic study. I think that—I do not share his sense of hopelessness about being able to obtain independent data and trying to evaluate them in some way. It is a painful process, but I think it can be done, and we are starting to do this in the office now, on the basis of trying to review what you were presented at the hearings and so forth, but this is not something that can be done easily and, as Knight says, the results are problematical; there is no question about it.

We are not opposed to the 3-cent, $\frac{3}{4}$ -cent-per-minute set in your bill, the bill now under consideration by you, either. In other words, we are saying that $\frac{21}{2}$ cents was, we consider, fair in 1967. We are not saying that 3 cents is unfair in 1975. We cannot agree that the factor of inflation taken alone is automatically sufficient to justify the increase, but we equally cannot agree that inflation of the sort we have

seen in recent years can be discounted entirely.

Although these points have been made many times, it bears repeating that the mechanical royalty is compulsory only on the copyright owner, not the recordmaker, that it has a ceiling but no floor, and that the real market value of mechanical rights in this country has never been established, because ever since those rights were created in 1909,

the bargaining power has all been one way.

In a typical case at present the individual authors—I am not talking about the total copyright owner group, but the authors of a song—will divide I cent per record, which would be \$1,000 for a hit record song, 100,000 copies. Now, we are talking here about—I am talking about inflation, and we are talking about individual songwriters, not corporations. And the impact of inflation on them since 1967 has been real. The cost of making records has risen dramatically in the last 10 years, but so have the prices of records.

It may be true, as the RIAA claims, that corporate profits in the record industry have decreased because of inflation. I have no basis for arguing with that. The fact remains that, of the various individual human beings that are involved in making a record, the individual songwriters are the only ones who have received no increase in their remuneration to make up for the rise in their individual cost of living.

The range of rates under discussion in the two Houses at present at 2½ cents and 3 cents. The Copyright Office believes that Congress has enough information before it to enact a fair rate within this range, recognizing that the rate's relation to true market value, and its effect as a ceiling will be thoroughly examined by the royalty tribunal.

I would add, in response to Mr. Wiggins' point about the floor, I have thrashed around in my own mind for a long time as to whether or not there might be some way of doing as the songwriters have suggested and establishing a floor, but you cannot have a floor in a compulsory license of this sort. You could have a compilsory license that sets a rate, period, and provides negotiations between those, but this would have to supersede any free negotiations, and as long as this is the alternative to free negotiations, you just cannot have a floor. It just is not possible with this kind of compulsory license. You would have to restructure the compulsory license very radically.

I think that there are cases where it is necessary to negotiate down, perhaps even below 1 cent, in certain cases, in order to sell your song, and I do not think it would be possible to take that right of a free negotiation a way from the songwriters under this kind of compulsory license. I am not saying that your basic point, I am not saying is ill taken, but I think it argues more for doing away with compulsory licensing altogether rather than trying to restructure the present

system.

This is the end of my presentation.

Mr. Kastenmeier. Do the members have questions of Ms. Ringer at

this point?

Mr. Drinan. I want to thank you, Ms. Ringer, for this presentation. But I have a lot of trouble with the setting of this fee. And that, as you point out so well, was a happenstance of history, and you say on page 36 that the compulsory license has taken solid root in U.S. copyright law. We have passed the point of talking about free negotiations in this area. Well, that is not so if a majority of this subcommittee say so.

Aside from all of the historical tradition and the apathy in Congress, what do you think of the merits? I have great difficulty in saying it is 2 cents or 4 cents or whatever. Why should we be in this business?

Ms. RINGER. Let me say in principle I agree with you.

Mr. Drinan. All right. Thank you. Where do we go from there?

Ms. RINGER. I think that one must recognize the realities.

Mr. Drinan. The realities, ma'am, are that there are lobbyists out there who are pouring mail into me and all the members of the committee and they want something. And I do not want to give them something that is going to downgrade the consumer and do nothing really for the authors and the composers as you say here. So I am not going to be trapped. I will vote no. I just will not come. I will delay the thing until somehow we get what you say is correct.

Ms. Ringer. I cannot argue with you in principle. In speaking of realities I am speaking not so much of the realities of lobbying as the

realities of the music business. I think it would send a shock wave through the music business if we took away the compulsory license immediately.

Mr. Drinan. It would what?

Ms. Ringer. I think it would send a shock wave through the music

industry.

Mr. Dringn. That is what Congress is supposed to be doing. Well, on the asymption we are trapped by something that never should have been devised, why can we not at least do what you suggest on page 39, invent a fair and more flexible approach which they do in other nations. Then you say giving up the ghost on page 40, it seems clear, however, that this time has not yet arrived. Why not?

There are people here, the majority of the subcommittee, who have never been through this difficult area before, and I am prepared to

send shock waves if that is the just thing to do.

Ms. RINGER. Let me respond by saying that in the 1963 preliminary report, preliminary draft bill, we had a section like this. And I think it would be well to look at it again and see what you think of it. I do not think that the Hart bill was satisfactory in the sense that it spoke of the established list price which is a chimera.

Mr. Drinan. But you would agree that the basic approach in the bill as it exists now, and in 2223, is less fair and less flexible than it

could be.

Ms. Ringer. If you want a yes or no answer, the answer is yes.

Mr. Drinan. Thank you very much. I do. I like that type of answer I like.

Now on the question that—assuming we cannot win on those two basic issues—that we have to decide how many pennies we are going to give, and that the Knight report here sets it out very clearly that we have none of the information that we need if we are going to pretend that this is just; and that the Knight report, 150 pages, and no one has attacked the objectivity of that. He is apparently a researcher and the industry had not heard of him over there in the Library of Congress. And he says that—and I agree totally with him—that we have none of the information that we want.

All I know is you go out there and you pay \$6.95 or \$8.95 for a record and you say, well, my God, why does this cost this much? And on page 43, you say, according to Mr. Knight, it says the Congress should require disclosure of the financial records of all music publishing and record firms. And we do not have that and they do not want to give it. And the next you say the publishing and recording business should give us that and they have not. And then even the artists or the recording people, or the composers, they have not given us. So we have no knowledge, we do not know what we are doing.

And I think you admit that on the bottom of page 44. You in effect say, and so it goes, and that means to me that Congress does not know what it is doing. That is the way it comes out to me. And you go back and forth on these things, the various economic data submitted, and we have only fragmentary evidence which, as you suggest, is totally in conflict which we received in the previous weeks; and that you say,

understating the case, "the pricing of records in other nations is more

orderly." You mean cheaper.

Ms. RINGER. No. They are more expensive actually, and they do have cartels there. I think I use the word correctly. Records have traditionally been cheaper in the United States than anywhere else. But there has been all of this discounting and clubs and all of this sort of thing where to try to fix in on a price to take a percentage of is very harrowing.

Mr. Drivan. Well you tell us to go ahead without any evidence whatsoever in my mind, and you say, at page 45, it is obviously much too late in the game for Congress to undertake the kind of thorough going review urged by the Knight report. Well, I like to think that we are going to make a judgment on some evidence, and you just say it is much too late. Why is it too late? Let us postpone this until we get some evidence.

Ms. Ringer. By postponing it, you leave the fee at 2 cents. That is a big problem, and I think that most people would agree. Most people, not the record industry, but most people would agree that this is too

low.

Mr. Drinan. Well, then you try to help us and I appreciate your testimony. You say here that you are not opposed to a 4 cents minimum rate, et cetera, but you are not opposed to something else either, but I am troubled by what you tell us here on page 46: In a typical case the individual authors of a song will divide 1 cent per record, or \$1,000 for a hit record selling 100,000. Well, the record companies are making a bonanza.

And the whole point of the copyright law, as I understand it, is to enhance creativity, to reward the author or the composer. So I see frankly a deliberate frustration of the basic purpose of the copyright law as the Founding Fathers inserted it. So why should I go along

with a system that does that?

Ms. Ringer. The system was established in 1909 under unfortunate circumstances. I think clearly if Aeolian had not gone around buying up copyrights, we would not be facing this problem now. But we have to look at the problem. We have got 60 years down the road, and we have got a structure that revolves around this. I am not defending it, do not misunderstand me. I do think that in fairness—this is what I was trying to suggest earlier—the subcommittee in 1966 spent quite a long time on going o... this in its markup, and went deeply into the economic data that had been presented, and what we in the Copyright Office could come up with from independent sources. I know the chairman and Mr. Fuchs remember this very well, and nobody was terribly satisfied that this was a complete answer.

But Congress is not trying to give a complete answer. It is trying to provide—I mean, it is not setting the rate—it is trying to set the ceiling which it considered too low in the present law, and which it felt, on the basis of a real study of economic data, did not deserve to

be raised more than one-half cent.

Mr. Drinan. Well, Ms. Ringer, you conclude on page 46 that the Copyright Office believes Congress has enough information before it to enact a fair rate within this range. I do not have any information

that is persuasive to me at all. What is this information we are supposed to have?

Ms. Ringer. Well, the information is very similar to what the subcommittee has in 1966, and which it was able to massage sufficiently to reach a conclusion that I think it felt was fair, using the criteria that it laid out, which I have repeated here. And I do honestly think that—

Mr. Drinan. Except we have nothing, or virtually nothing, of what

the Knight report suggested that we need.

Ms. RINGER. That is right. The Senate did not either, and the Senate

is likely to pass the bill as it stands without that kind of—

Mr. DRINAN. You said that "Knight's conclusions were correct," and yet we do not have anything that that report said that are essential before we can make a just judgment. And yet you say we have enough information to move forward.

Ms. Ringer. The Knight report obviously—and this is what I agree with—concluded at its base that what had been presented in the hearings was insufficient to reach a kind of definitive conclusion as to what the rate ought to be. But there are many cases, I assume, in which Congress is presented with situations in which no definitive answer is possible. You are not called upon to make the rate here. And remember, I repeat, that you will have a royalty tribunal working on this, which I would assume would be able to do the sort of thing that Knight asked, in effect, the Senate to do. And it did not.

Mr. Drinan. Thank you very much.

Mr Kastenmeier. Well, I think you have made a number of points that are correct. We have a massive amount of material on this point—that is, 2 cents versus 3 cents—presented to us. The point I think Mr. Knight was making was that notwithstanding the fact it was so voluminous, that it was not necessarily reliable or qualitatively the sort of testimony we could necessarily reach a perfect answer from, deriving from that amount of testimony.

I do recall the parties seemed willing to use the frame of reference of 2 versus 3 as a point of their testimony. They were—although previously, of course, there was some question as to whether there ought to be a compulsory license at all, that argument had been made, but it seems that the publishers and the composers were willing to make a case for 3 cents without raising the other questions again. And the commit-

tee at that time accepted that being the context of the debate.

Whether it is now possible to reach another—whether there is enough testimony presently and historically on this subject, I am not sure that it would necessarily ever satisfy anyone; whether the ideal that Mr. Knight suggested—I hope it is possible. But I should not want to attempt to do so—or this subcommittee, knowing what it has already been exposed to on the subject over a period of a decade. I do not know that we can make perfectly informed judgments—n every aspect of this very, very long bill, and very complicated bill. All we can do is the very best we can.

The gentleman from New York?

Mr. Pattison. I would like to follow up on this notion of a floor that was suggested by the songwriters, and I agree with you that it poses all kinds of difficulties. But I was particularly troubled when I talked to some of the songwriters about a factor that I had not

thought about, and which is unfortunately not within the jurisdiction of this subcommittee; and that is the problem that occurs when a songwriter enters into a royalty arrangement with a publisher. Essentially that is a joint venture, and the publisher is given the authority to negotiate with record companies on behalf of the songwriter and itself. And you would think that normally that their interests would be identical, so that you would have no problem with that representation.

However, there comes a time—there is developed in the industry a vertical integration, and that is where we do not have the jurisdiction, whereby the songwriter frequently feels that he is being sold out by a publisher with whom he has negotiated and a publisher negotiating with the company that he essentially owns. The songwriter says that essentially we will make a good deal for one of the songwriters, the lead record perhaps, and then sort of give away the others; so that that is their argument for a floor.

Now, I think that essentially the way to solve that is to have legislation relating to—perhaps prohibiting the publisher from doing that or allowing the copyright owner or the author to pull out of that arrangement at will, and perhaps legislation relating to vertical integration. But that, it seems to me, is the only rational argument that

can be made for a floor.

I would like you to comment on that.

Ms. RINGER. I have been through this same mental process. I would add to what you said, that it seems to me one of the hopeful signs of all of this is that the songwriters are speaking for themselves in this now and have become a little more activist than they have been on this issue. I am not being critical, but I think it is a good sign. And what you are describing is negotiations and relative bargaining power between songwriters and publishers. And I think that these things are changing and should change some more.

I am dubious about the desirability of the heavy hand of Government in this kind of situation. It is pretty heavy already here. I just do not see how a floor of the kind they are talking about can be established. I have talked to them, and their counsel, and they have never been

able to come up with a formula.

Mr. Pattison. In other words, it would have to be so low as to be meaningless.

Ms. Ringer. That is right. You have only got one---

Mr. Patrison. Or else set a rate.

Ms. RINGER. That is right. You can always set a rate, but then this would completely restructure this. And I think you would end up being more unfair than fair because many of the rates would be too low.

Mr. Pattison. Would it be appropriate to have a provision in the copyright law—and really essentially this is an ethical problem. This is like having the feeling that your lawyer is selling you out. You can always fire your lawyer because he may be selling you out, because he has got three cases that are similar and he is working with the same insurance company and he trades one off against the other.

Now, whenever you think that is happening, that is an unethical practice and you can always get rid of the lawyer and get another lawyer. But apparently the songwriter, when he enters into this

contract, when he sells his song and retains a royalty, does not retain that privilege. Could we have a provision in our statutes that would provide that the songwriter could have some mechanism for getting

out of that if he feels he is being sold out?

Ms. Ringer. He certainly could. But I am doubtful as to its wisdom. I think you would need to consider a whole range of other factors that would be involved. In other words, the problem you are putting your finger on is certainly not limited to music. It covers the entire range of the copyright law and I do not think there is any doubt that many authors are getting ripped off by somebody or other in business dealings.

I would say this, that the Knight report itself, even in 1969, suggested rather strongly that there are some emperors that do not have any clothes in the music industry. And that is one of the reasons why he felt that the whole industry should be looked at independently, rather than by use of statistics, or partial statistics that they are willing to put forward. We all know that the way the music reaches us and the form of music that is available to us is quite different from that 20 years ago. There has been that radical a change that is obvious to all, and there are corresponding changes in the industry.

Mr. Pattison. Let me follow up on this question. Would it not be possible for this to develop as a matter of practice in the music industry? In other words, could a songwriter not say in the sale of his song to a publisher that you have the right to negotiate for me. However, to the extent that you negotiate with someone with whom you are affiliated, then I have the right to approve or disapprove; could they not handle that by contract themselves? And if they can, why have they

not?

Ms. Ringer. I cannot speak for them, but there are old forms and old relationships that probably outlive their time. That would be my answer.

Mr. Pari In. Prospectively then, if I represented a songwriter would it not be prudent for me to say in his deal with the publisher that the publisher has the right to negotiate for the sale of this to recording companies? However, any deal that is made with a recording company in which the publisher has an interest, that would be subject to my prior approval, and that would essentially solve the problem.

Ms. Ringer. It would solve that problem.

Mr. Pattison. Yes.

Ms. Ringer. Given a strong enough organization or songwiners or a union or something like that, I think this certainly could be done and it would solve that problem. It might create others.

Mr. Patrison. Thank you.

Mr. Kastenmeier. Mr. Wiggins?

Mr. Wiggins. Thank you, Mr. Chairman.

I want to pursue this a bit longer. There certainly are other subjects, but this one intrigues me for the moment. I understand your testimony to recommend against legislating a floor and recommending against legislating a rate for primarily the same reason that it would interject rigidity and that would not accommodate market forces which may require less than the statutory rate or minimum. And I can understand that indeed it can create a problem where it would have a chilling effect upon creativity, simply because it would be impossible for new people to get started in attempting to sell their work.

But it seems to me that that argument is premised upon certain bases; one is that the parties are relatively equal in their bargaining power. And I think that they are not, and I take it it starts from the bottom, at the creator, and he is less powerful than his publisher. And the publisher is probably less powerful than the manufacturer.

And the second is that this estimate of the market and what it will absorb and pay for really represents a guess as to how many records

will be sold in the future, and at what price.

Now would not the Hart approach accommodate those market forces? If we were to legislate a payment based upon a percent of selling price, does that not anticipate absolutely and finally what the market will do? If zero records are sold, he gets nothing; if a million are sold you get a lot. Is that not a fairer approach than trying to fix a figure which is really based upon a projection of the market by people who are in unequal bargaining positions?

Ms. Ringer. I certainly will not argue with this in principle, and as I indicated to Mr. Drinan, I think we should, in view of your questions, take another look at the efforts to try to draft this; and a perhaps more

searching look than we have so far.

The way this is handled in foreign countries—I do not think that the record industry wouldan any way agree upon this as a compromise at this stage. Maybe that is not of any importance, but I think if we are thinking in terms of trying to work something out here, and there are other issues that are involved in this bill besides this in which the record industry is interested obviously——

Mr. Drinan. Why not work out something?

Mr. Wiggins. Well, that answers your question, Father, because it

would work to their economic detriment. That is why not.

Ms. Ringer. Absolutely; they would feel this would be similar to taking off the ceiling altogther; that 8 percent presumably would be substantially more than anything they would be willing to consider. I did not go into their arguments, but essentially they are saying that—

Mr. Wigens. I would not be wedded necessarily to a figure, and I recognize whatever figure we establish itself is subject to negotiation in an environment where unequal parties are dealing with each other. But just conceptually, without reference to these practical problems, it has some appeal to me as being a fairer approach, than legislating $2,2\frac{1}{2}$ or 3 cents.

Ms. RINGER. If a base could be established on which the percentage was computed, and you took account of all of the variables, I would

certainly not disagree with you in principle.

Mr. DRINAN. Would the gentleman yield?

Mr. Wiggins. I yield, of course.

Mr. Drinan. Was Senator Hart's proposed 8 percent based on some theory in this area that they should not set a fixed fee, but that would

be an estimated—how did he get to the 8 percent?

Ms. RINGER. It is a common figure. I think it is the figure in England, I am not positive. But it was the proposal of the National Association of Music Publishers. I think after the 2½ cents they went forward with a major project in the Senate to try to change the base to a percentage, and they went forward with 8. That was their proposal.

Mr. Drinan. Thank you for yielding.

Mr. Wiggins. Do you have any idea what the revenue would be

expressed in terms of a percent of sales, of sale prices now?

Ms. RINGER. No. We could work out some kind of estimate based on what figures we have, but I could not give you even a ballpark estimate now.

Mr. Wiggins. It does have some practical problems. It would require a higher degree of bookkeeping. Well, I do not purport to have this all worked out in my mind, or even embrace it necessarily. If you have any subsequent material on this subject, I personally would appreciate it.

Mr. Kastenmeier. I would like to now move on to chapter 10, section 116.

I regretfully must say I will be absent from the hearing room for perhaps 15 minutes or so, and will ask Mr. Drinan to preside.

Mr. Drinan [presiding]. Ms. Ringer, why do you not just proceed in your usual fine manner.

Ms.RINGER. Thank you.

This is the so-called juke box question which is contained in section 116, and, as identified in chapter 1, page 10, I think this has now resolved itself down to three issues.

If I may start reading from page 2, and I will try to summarize some of this although it is a rather short chapter. The hearings before the House Judiciary Subcommittee on June 3 of this year were devoted to this section, section 116, and they proved a pale reflection of the full-blooded lattles waged over this issue for really nearly 50 years.

Since 1926 the jukebox operators have successfully staved off continuous attempts to repeal the present jukebox clause of the 1909 law. And I repeat it here; it is an outright exemption of performances upon coin operated machines.

This outright exemption was added to the 1909 act without explanation just before its passage, apparently as the result of some last minute legislative expediency. I do not think anyone has ever discovered what the deal was here.

As long as the machines involved were player pianos and similar musical automata the economic impact of the exemption was slight, but with the enormous expansion of the jukebox industry beginning in the 1920's, unfairness was more and more apparent.

A particular sore spot has arisen from the fact that American copyright owners, whose works are popular in foreign countries, received substantial royalties from jukebox performances abroad while a foreign composer who has a jukebox here in the United States receives nothing from that source.

Proposals to remove the exemption have taken different forms, and by the early 1960's it was becoming apparent that some sort of compulsory licensing probably offered the only realistic solution.

I must emphasize, Mr. Chairman, that when we embarked upon the legislative phase of the revision program the jukebox activity was in full swing. There was a great deal of activity in this committee in the early 1960's separate from general revision. And the 1961 Register's report took account of that, and in effect was saying press on with the efforts to repeal the jukebox provision. And whatever comes out of that should be worked into the general revision bill.

The basic conclusion was—which is in the middle of page 3—that the jukebox exemption should be repealed or should at least be replaced by a provision requiring jukebox operators to pay reasonable license fees for the public performance of music for profit. The consideration of legislation proposed for this purpose should continue without awaiting the general revision of the law. And it did.

House hearings were held in 1963, and a bill completely removing the exemption after a 1-year period was reported with minority views by this committee on September 10, 1963. It was addressed right up to 1965 as a separate issue, and—if I may then skip to page 5—the arguments that had been going on, actually since the Second World War, in Congress over this issue continued right through the House hearings in 1965. And your subcommittee reported a bill on October 12, 1966, which contained a jukebox section based on a compulsory licensing system.

Now at that time—and a lot of this seems to have been forgotten—but at that time there were four different possibilities for dealing with the problem. They talked about compulsory arbitration, compulsory license with a per box maximum, which is not exactly what we have here, compulsory license with a fixed fee per record purchased, and

a compulsory license with a fixed fee per record in the box.

And that is what emerged and went through the full legislative process in the House up to the time the bill went to the floor in 1967. The explanation is at the bottom of page 5. And again, this subcommittee went through a very thorough economic analysis of the problem and set an alternative quarterly fee of either 3 cents per song, or a prorated amount of less than 3 cents based on box capacity and the total number of songs available for performance during a quarter.

This was complicated, but it was the closest approach that the committee could find to what it considered a fair solution to the problem at the time. On this basis it estimated that annual royalties would

average \$19.20 per box, or about \$9 million per year.

Now this formula was again adopted by your committee, and when the bill went to the House this was, I think, the most controversial issue when it went to the House floor. And without going into the details of that very difficult compromise, a compromise was hammered out, almost literally, and it was based on the clear observation that

the bill could not pass unless a compromise was reached.

Neither the system nor the amount that was in the House report—the committee-reported bill—could survive, and it was a question of either letting the whole bill go or trying to compromise this issue, which was essentially a money issue. After strenuous negotiations, essentially the same formula now in the bill was passed by the House on April 11, 1967. The amount of the royalty was to be \$8 per box. The Senate did not accept this compromise at first; it kept the House reported version for longer than would normally have been expected, but eventually it went over to the flat \$8 per box rate.

Then, in 1969, it added what used to be section 114 of the bill—which I will discuss if I ever get to chapter 8—the performance royalty for records. And that, of course, applied to jukebox performances as well as broadcasts. And the Senate added a dollar to the \$8, making it a \$9 fee, with \$1 pegged for the jukebox, to go for the

performance on the jukebox. And it added a 50-cent fee to reimburse the Copyright Office directly for the paperwork involved in licensing individual jukeboxes.

Picking up on page 7, the 1969 bill, as reported, also set up the Copyright-Royalty Tribunal, and, among other things, gave it responsibility for periodic review and adjustment of the \$9 jukebox royalty.

These went forward in the 1971 version of the revision bill, and in the 1973 version as originally introduced in the Senate. But on July 3, 1974, when the full Senate Judiciary—when the Subcommittee of the Senate Judiciary Committee reported the bill, the fee was reduced to \$8 with one-eighth, \$1 going to the copyright owners and performers of sound recordings. The 50-cent registration fee was deleted from section 708, though, as you heard testimony, a vestige of it remained in section 116.

The reported bill retained the provisions in chapter 8, making the \$8 fee subject to periodic review by the Copyright-Royalty Tribunal, which meant that they were back to the House version of April 1967, but with the possibility that the Royalty Tribunal might reexamine,

and conceivably raise, the \$8 fee.

This provision, the applicability of the Royalty Tribunal, was deleted from the bill on the floor of the Senate on September 9, 1974. Senator McClellan, who had been opposed to this, inserted something in the Congressional Record which I think expresses his feelings on the subject.

He said, "In speaking against this amendment on the floor, I said it gave no protection to the consumer, for a jukebox operator can increase the fees charged to the public, but for all practical purposes, the payment that he makes to the composers of the songs played on his machine are permanently frezen."

Well, of course, this is not really true in the sense that Congress can always change them, but they were certainly frozen until Congress

acted.

Again on November 27, 1974, Senator McClellan wrote to jukebox operators, manufacturers and other interested parties indicating once more than he felt the annual fee should be \$19.70, which had been a figure that had been floated around in the late 1960 hearings, especially

if the \$8 was not to be subject to review.

The 1975 bill, as introduced in both Houses, adopted the form in which the 1974 bill passed the Senate. But when S. 22, which was the Senate version of your bill, was reported by the Senate Judiciary Subcommittee on June 13 of this year, the provision for Tribunal review was restored in chapter 8. And this change was retained by the full committee when it reported S. 22 to the Senate on October 7, 1975. And when I wrote this I had not seen it, but I know that you have now—or the chairman has now received a request to amend the House bill to conform to the Senate reported bill—this is the Judiciary Committee; the Senate has not yet acted on the full bill yet.

Meanwhile, you held hearings on this issue on June 5th, and this was the first jukebox hearing since 1967 after all the many, many hearings earlier in the fifties and sixties and so forth. The same old pro and con arguments were made, but the tone was muted. It appeared to some observers at least that the only true issue being seed was whether

or not the \$8 fee should be subject to Tribunal re ew.

Again, section 116 seems too far down the road to warrant reopening either its premises or its basic formulation. The vestigial reference to section 708 should be removed—that is the 50-cent thing—assuming the committee wishes the cost of licensing jukeboxes by the Copyright Office to be borne by the copyright owners. This is going to come out of their \$8 in other words.

Similarly, it might be wise to add language making clear that coin operated machines include devices activated by tokens and currency, et cetera, since, if you are familiar with jukeboxes these days, there are

some that you can operate by putting in a dollar bill.

Mr. Drinan. That is progress.

Ms., Ringer. Aside from these minor adjustments, the only questions are the \$8 amount and whether the Royalty Tribunal should be able to review. These are essentially practical and interrelated questions. The Copyright Office takes no position on them, although, as in the case of other compulsory licenses, we recognize that the Tribunal could be more effective than congressional committees in marshalling and evaluating the masses of economic data necessary to revise the rates up or down, and that a congressional veto power is provided.

Mr. Drinan Thank you very much, Ms. Ringer.

I have just one question and then I will yield to Mr. Wiggins.

Is there any way by which we can set the maximum decibels of this creature?

"[General laughter.]

Mr. Drinan. Mr. Wiggins?

Mr. Wiggins. I have no questions, Mr. Chairman.

Mr. DRINAN. Mr. Pattison?

Mr. Partison. There seems to be an argument developing on the Tribunal as to whether the Tribunal should set the rate of the congressional veto, or whether the tribunal should recommend a rate, having developed the information subject to congressional approval.

Do you have any particular feeling? That also relates not only to

this particular issue, but to other issues as well.

Ms. Ringer. Actually, I am wrestling with this now—this is chapter 8 of the bill—and now, as I have organized the rest of my presentation, I will have a separate chapter on this, and I have not come to

a final conclusion on your question.

I amotroubled—as I have indicated earlier, I think in connection with the cable issue—by the one House veto arrangement, and the fact that you really do not know what happens then. If one House vetoes, what do you do? And I think that obviously needs to be addressed. It has been suggested that you might have the rate set by the Tribunal and allow paying out so that the funds are not tied up—in other words, assume this is valid but allow the courts to test it.

I know this is being suggested, and I would like to save my comments

on that proposal until later.

Mr. Parrison. Fine. I will look forward to getting those. But there are constitutional issues also which would be obviated by doing it through the mechanism of having the Tribunal recommend and the Congress act. And those constitutional problems I am not sure how serious they are, although we have some memoranda on that that indicate that they may well be serious.

Ms. RINGER. I am going to try to address this in chapter 15. I think that the questions are serious ones and need to be addressed. I think that the provision is shakier on some constitutional grounds than others, and there are several points of attack. But I would rather really save that, if I may.

Mr. Patrison. Fine.

I have no other questions.

Mr. Drinan. Ms. Ringer, if these creatures now can absorb a dollar bill, we have trouble with the statute that talks about a coin-operated

phonorecord player.

Ms. RINGER. This is my point, Mr. Drinan. And the Senate report on this anticipated this, and rather boldly interpreted coin operated to mean currency operated, which is probably all right, but I think it would be just as well to put it in the bill since the literal language is coin.

Mr. Pattison. Or Master Charge operated, I suppose.

Mr. Drinan. Operated for profit in any form.

Well, I am encouraged, Ma'am, that you think this problem may have receded into the past, and I am glad that you think that conference we had on June 5 the hearing was muted. I did not think at least in the sequel they keep writing.

But, Mr. Wiggins? Counsel? Any more questions on this chapter? All right, now the masses of economic data that you mention on page 9, would you feel that we got sufficient evidence on and after June 5 about this industry to make some type of a ballpark judgment?

Ms. Ringer. No.

I do not think that \$8 recognizes anything other than a compromise figure. It really does not bear that much relation to the points that the economic data I was talking about were addressed to.

I would say if the thing were under the tribunal these could well be

addressed, although-

Mr. Drinan. Well, it is under the tribunal in 2223.

Ms. RINGER. That is right—no, no, it is not. It came out on the Senate floor, and what you have in front of you is what came out on the Senate floor. It has gotten back in the Senate, and whether it survives in the Senate when it gets to the floor again, I do not know, I cannot predict.

Mr. Drinan. Well, in the event that the \$8 is adopted, does the

jukebox industry desire to be under tribunal or not?

Ms. Ringer. Absolutely not.

That is the issue, I think, that is with us right now.

Mr. Drinan. Where does the term come from—jukebox?

Ms. Ringer. I have known, but I have forgotten.

Mr. Drinan. It is a minor point.

Ms. Ringer. I think it is Southern dialect referring to cafes or other establishments in Georgia. This is what sticks in my mind, although there are others who are in this room who know more about this than I do.

Mr. Drinan. All right. If there are no further questions, why not move on to the next chapter. Is it 11?

Ms. RINGER. Yes.

Mr. Drinan. All right, thank you.

Ms. Ringen. I think we are out of the really hairy problems for a while.

Mr. DRINAN. The hairy problems are gone?

Ms. Ringer. For a while.

The next chapter is on copyright ownership and transfer, and it covers the whole of chapter 2 of the bill. And as say on page 2, during the prelegislative period in the current revision program, particularly between 1961 and 1965, the provisions on ownership and transfers of copyright were the subject of close scrutiny, some hot debate, and a great deal of tortuous drafting and redrafting.

Almost every provision in chapter 2 represents a compromise of one sort or another. And those involving works made for hire and termination of transfers were extraordinarily difficult to achieve.

However, by the time the bill reached the stage of hearings before your subcommittee in 1965, most of the disagreements were either resolved or on the way to being resolved. After painstakingly reviewing chapter 2, particularly the labyrinthine provisions of section 203, and after adopting some amendments, the subcommittee produced a chapter on copyright ownership and transfer together with a definitive legislative report that have remained unchanged and virtually unchallenged for nearly 10 years. I guess I should say virtually unchanged and virtually unchanged and virtually unchanged.

I do not think I will take the time, unless you want me to, to summarize the provisions of chapter 2 in detail—or in any other way. The summary that appears at pages 3 through 5, I think, covers the whole chapter pretty well. And let me summarize its effect by saying I think it is fair to say that every change from the present law on this rather important subject is in favor of authors, either directly

or in general.

There were some tradeoffs, particularly on the reversion in section 203, but I would say that essentially the author gets a better shake in almost every respect under chapter 2 than he does under the present bill. I may be challenged on this, but this is my own opinion.

There are some technical issues that remain, and I tried to cover them in this chapter. I think there is a problem that has not been

recognized with respect to commissioned portraits.

I find for some mysterious reason the Senate put commissioned portraits under a provision—under the definition of works made for hire which I am not sur 's fair. And I want to raise this, and I hope that we will generate some comments on it thereby. But I do not think I need to divert you with this right now.

I would like to discuss the issue of involuntary transfers which are

covered here on page 8.

You initially heard some testimony on this issue from the State Department on the second day of your hearings. This provision is now in section 104(c) of your bill, and as I explained above in chapter 1, the 1975 bills as introduced contain in section 104 provisions stating that the expropriation of copyright by a governmental organization of a foreign country was not to be accorded legal effect under the U.S. copyright statute.

This provision originated as a response to concerns arising from adherence by the Soviet Union to the Universal Copyright Convention,

and the State Department did testify in favor of a provision that would deal with the fears that were being expressed on this subject. Namely, that under the new copyright relations with the Soviet Union, works by dissident authors could be controlled, and their publication enjoined in this country.

This is overstating the argument a little bit, but essentially that

was it.

Now we have taken a position in the Copyright Office consistently favoring the principle of this, but we felt that the language, and the place of the provision in the bill, was probably a little problematic. And so we have participated in a redrafting which involved moving this provision to section 201 which is where it belongs. It involves ownership and exercise of ownership and transfer. And this was adopted by the Senate Judiciary Subcommittee and by the full committee on October 7 of this year, and it now appears as subsection (e) of section 201—and you do not have this in the bill, but the provision is here on page 9, and it is broader than the other provision. But in my opinion it is a statement of the present law.

I do not think the provision alters the present law: what I think it does is quiet fears about how the present law might be misused.

The Senate report on S. 22 has not yet been published, but it will presumably use the 1974 Senate report as its point of departure. It will make clear, if I am correct, that the purpose of the provision is to reaffirm the basic principle that the individual author is the fountainhead of copyright protection, and that his copyright cannot be

taken from him involuntarily.

As now worded, the provision would apply to all involuntary transfers, including but not limited to foreign expropriation. Some concern has been expressed about the effect of this, or the earlier versions, on bankruptcy and mortgage foreclosures, but the report would make clear—and I think correctly so—that legal actions involving copyrights, such as bankruptcy and mortgage foreclosures, would not be affected by this subsection since the author has, in effect, taken a voluntary act that consents to the transfer. I think that is self-evident and I think that what is laid out here on page 9, which is now the Senate version, is something that we concur in and that we have also received support from the Authors' League on too. They are strongly in support of this provision, as well.

And this is all I would like to say on chapter 11 unless you would

like me to go on, Mr. Chairman.

Mr. Drinan. Would you explain just one bit. I am not certain I got

that about the possible effects upon Soviet dissidents or others.

Ms. Ringer. The argument ran—you see, the Soviet Union did not belong to any multilateral copyright convention until 1973. And when it joined there was a great deal of speculation as to what the effect of this would be and what the motivations behind it were. And one of the fears that was expressed was that because now the work of a Soviet author, for the first time, would be copyrightable in the United States that the Soviet Union could expropriate—this was the fear, whether well-based or not, that they would expropriate the copyright and be able to sue in U.S. courts to enjoin the publication of a work that had been smuggled out, or gotten out some other way.

And the Authors' League and others supported legislation, separate legislation, in the Senate which has gone through a good deal of refinement, and I think we are finally down to this provision on page 9.

Mr. DRINAN. Thank you.

I think the Authors' League as a matter of fact wrote to us—just recently wrote to me about that very point. This is among much of the copyright mail that came in in the last 3 days.

Well, I guess we are supposed to be glad that you have a noncontro-

versial chapter, but it is not as interesting as the others.

Ms. RINGER. That is right, I am sorry to say.

Mr. Drinan. Mr. Wiggins, do you have any questions?

Mr. Wiggins. I have no questions.

Mr. DRINAN. Mr. Pattison?

Mr. Parrison. I have no questions.

Mr. DRINAN. All right, Ms. Ringer, proceed.

Ms. RINGER. This is the manufacturing clause, if I may leap over to chapter 14. I do not know how far I will get with this, but I will get as far as I can.

This came to me in the form of these folders this morning.

Mr. Drinan. Yes, you may proceed if you will.

Ms. Ringer. All right, thank you. I apologize for the length of this chapter, but—and I will be honest and say at the beginning I did not include this in the seven big issues that I saw at the time when the hearings commenced. I think it is a big issue. I think it should be listed among the top, and I think that on reviewing the interrelated issues, which are very complex—and you must decide them—I decided that it might help to try to lay this all out for you—I do not plan to go through it this morning—to see how this strange animal was born and grew up and. I hope, eventually will die. The whole history of this is a part of the history of our country, and it is kind of a fascinating legal and historical study. It was—if I may make a side observation—the subject of the first long legal research paper I ever did in the Copyright Office in 1950, and really the better you get to know this provision, the more you come to loathe it. It is a terrible, terrible provision.

Let me start by reading from page 3, and I think this is really simply to set the stage. For over a century, the U.S. copyright law offered no protection whatever to foreign authors. From 1790 to 1891 no foreign author could be protected under copyright in the United States. Following the lead of State copyright laws enacted under the Articles of Confederation, the 1790 Copyright Act granted protection only to works by citizens or residents of the United States; but it became clear soon enough that what seemed on its face to be preferential treatment in favor of American authors actually amounted to devastating discrimination against them. English books and authors were popular with the American public and required no permission or payment of royalties. Why should U.S. publishers bring out American books, for which the profit was uncertain, when they could publish sure-fire English books without seeking permission from anyone or paying anything? The problem was compounded by the lack of any international copyright relations between the United States and other countries: if an American author did manage to achieve some success in his own country, he would find his works reprinted, translated, and published throughout the rest of the world without permission or

payment.

This situation produced what became known as the international copyright movement, which proceeded without success from generation to generation throughout most of the 19th century in the United States. Beginning in 1837, Henry Clay sponsored legislation in several successive Congresses that would have granted U.S. copyright to foreign authors under certain conditions; significantly, one of those conditions was that their works must be printed in the United States to be protected here. Note the subject matter addressed was works by foreign authors. No one dreamed that American authors would ever be induced to have their works manufactured abroad. They were having enough trouble having them manufactured here. However, until the last decade of the 1800's, the economic interests of the American publishers and printers, coupled with the strong protectionist sentiments of the era, served not only to keep the U.S. tariff on imports of foreign books very high, but also to defeat every effort at international copyright reform.

What finally emerged, in the act of March 3, 1891, was a complicated compromise which had the effect of giving U.S. copyright protection to foriegn authors with one hand and taking it away from many of them with the other. The key to the compromise was the manufacturing clause, which was the price demanded by printers, book manufacturers, and particularly the labor unions in the printing trades. Under the 1891 act, U.S. manufacture of books in all languages and of graphic works was an absolute condition of copyright protection; as part of the compromise, musical at dramatic works were exempted from the manufacturing requirement entirely. I believe in the testimony during the hearings you asked about music, and I am not sure you got the answer correctly, but the fact was that music has never been in the manufacturing clause. These were trade offs at the time

the compromises in 1891 were reached.

The practical effect of this provision was to make the obtaining of U.S. copyright extremely difficult for foreign authors writing in English. In other words, they had to arrange to have simultaneous publication in the United States with publication in their own country, and it was nearly impossible for foreign authors writing in other languages. How could a French author arrange to have an edition of his work published here in French before it was published in French in France? The history of the manufacturing clause since 1891 has been one of gradual legislative liberalization in regular stages, each one involving a process of confrontation and compromise. The following summary of the legislative history of the manufacturing clause from 1891 to 1955 is oversimplified, but is intended to convey in general terms what the manufacturing clause was, and how it has evolved. And I have here several pages, I think it goes all the way to page 11, in which the gradual process that I have described took place, up to the act of August 31, 1954, which was the act bringing the United States for the first time into an international copyright convention. This came into effect in 1955, and one of the key provisions of that act and the Universal Copyright Convention that it implemented was that for foreign authors qualifying for protection in the Universal Copyright Convention, the manufacturing clause was done away with, provided the work was published with the familiar "c" in a circle notice.

This was the key compromise in the Universal Copyright Convention, and as things have evolved, there is an enormous paradox here. This point was made, but I will make it again, that Henry Clay started out trying to deal with foreign works by foreign authors, foreign manufactured works by foreign authors; the whole structure of the evolution of the manufacturing clause has been in the direction of foreign works. We are now at the point where the principal impact, the great majority of the impact of the present law is on American works, American authors, and where, under the revision bill, the total impact would be on works by American authors; foreign works are exempted entirely.

I think I will leave you to read this, if I may, because it is just too complicated to try to summarize, but I will turn to the summary of the preent law, which is on page 12, and this is what we have come to. After the original act was in 1891, there were amendments or revisions in 1904, 1905, and then the act was revised in 1909, and there have been

revisions in 1919, 1926. 1949 and. again, effective in 1955.

This is the present law, not the bill. We are now dealing with books and periodicals in English, except where the work is exempted under the Universal Copyright Convention, and, as a practical matter, this means that the requirement now applies almost entirely to American authors. There are certain provisions dealing with graphic works. They are a terrible nuisance. I am not sure they serve a great deal of purpose for anybody, but they are still a part of our law. They would be deleted under the revision bill.

It is interesting to observe now, in the light of what we have been through over the last 10 years, that one major issue seems to have receded. Section 16 of the present law is poorly worded; they were trying to cover everything, and as a result they left some gaping loopholes, and one of them was an apparent loophole that allowed U.S. publishers to have foreign manufacturing firms do the composition of the type abroad and then import certain artifacts and reproduce the copies here. The wording of section 16 was so ambiguous that this was a possible interpretation, and they were certainly doing that, and this

was hotly contested in the middle 1960's.

Basically, the intention of section 16 is that all forms of book manufacturing be done in the United States. It did not have that effect. Under the present law, the principal exception if you cannot get out from under the manufacturing clause directly, the principal exception is known as the ad interim exception, or an ad interim copyright. For books and periodicals by U.S. citizens, first manufactured and published abroad, and for the few foreign works still failing to qualify under the UCC. a 5-year ad interim copyright can be secured by making registration and deposit within 6 months after first publication. This terror copyright can be extended to the full term by manufacture and registration of a U.S. edition within the 5-year period.

This class of registration, which was once quite widely used, is now not rare, but it is mainly American authors, and it is certainly a small

form of registration compared to what it once was. Under an ad interim copyright you can import up to 1,500 copies. This was a compromise that was reached in 1949 and expanded in 1954, intended to allow the testing of a market. In other words, this exemption is of recent date, relatively, and it is the core of this section 601 that you

are now considering.

Again, the Copyright Office has taken an active role in the 1949 amendment, as it had in the development of the Universal Copyright Convention. It was not surprising, therefore, that the 1961 Register's Report took a fairly strong position favoring elimination of the manufacturing clause as a condition of copyright protection. We hoped that the economic situation had changed sufficiently that the thing could be considered a last leaf on the tree and allowed to drop. That was not to be, at least then.

The expressed hope of the Copyright Office that "economic factors had changed sufficiently to permit the dropping of domestic manufacture as a condition of copyright" was dashed to earth by the book manufacturing industry, whose representatives, in the words of the 1965 Supplementary Report of the Register, "took a very strong position against complete elimination of the manufacturing requirements in the copyright law," and I think you heard again not a terribly strong echo of that in the testimony heard on September 18, but it was the same basic argument. It was a hot issue in the early 1960's, and it was pretty obvious that it had to be compromised, and the process, believe me, was

familiar with respect to the manufacturing clause.

In the 1963 preliminary draft, we put forward two alternatives: one opted for outright repeal, the other for a 1,500-copy limitation with the following subsection, and I think if you read this you will see that what I say in the next paragraph on page 15 is true, that with many changes in language and specific content reflecting a long series of compromises, this second alternative remains the basic approach of section 601 of the 1975 bill: domestic manufacture should no longer be a condition of copyright, and the ad interim and other formalities connected with deposit and registration would be eliminated. However, with many limitations and exceptions, the copyright owner would be prohibited from importing more than a certain number of copies manufactured abroad; this would be enforced by offering a complete defense to infringers who can prove violation of the import restrictions.

This is a very general summary, not only of what we put forward in 1963, but also of the present bill, with many changes in language and content. There was a very good spirited effort to compromise this. I would say that of these various efforts to compromise, this was one of the less rancorous. There was a genuine effort to go forward, but they could not reach a compromise by the time the House hearings were held in 1965 because of this loo, hole that I mentioned, which no longer seems to be that important, although that may be a little bit deceptive. The publishers were arguing strenuously that they should be allowed to compose their text abroad and then do the rest of the manufacturing here, and the book manufacturers and the unions were not prepared to accept that without some other compromises.

Essentially, therefore, they were not able to come to your subcommittee in agreement. They were in basic disagreement, and they argued the principle of the manufacturing clause; yet, once again, the 1965 House hearings appeared as a sharp and fundamental confrontation, but beneath the surface a current of compromise was still flowing. The House Judiciary Committee, in its 1966 and 1967 reports, adopted language intended to resolve the "repro-proof" controversy in favor of the publishers. This was embodied in your bill when it possed the House on April 11, 1967, and it formed the basis for further compromises that were going on during this whole period, both with respect to the repro-proof issue and the section 601 as a whole.

When you get to the—well, let me come back to the 1967 hearings in the Senate, and summarize the statement this way. Representatives of publishers and manufacturers reached a formal agreement, which I have included in its text and in this chapter, in 1968 as to the contents and wording of section 601, and have continued to adhere to that agreement to the present time. Because of this factor, the hearings on the manufacturing clause before the House Judiciary Subcommittee in 1975 approached some of the problems obliquely, and did not dig very deeply into the basic issues, and therefore, I have reprinted on pages 16 through 19 the summary of the arguments pro and con that was included in your committee reports in 1966 and 1967. I think they are still valid; I do not think they have changed at all.

Your committee concluded on the basis of these contradictory arguments—and this is at the middle of page 19—that:

Although there is no justification on principle for a manufacturing requirement in the copyright statute, there may still be some economic justification for it. Section 601, as amended by the Committee, represents a substantial liberalization that will remove many of the inequities of the present manufacturing requirement. The real issue that lies between Section 601 and complete repeal is an economic one, and on purely economic grounds the possible dangers to the American printing industry in removing all restrictions on foreign manufacture outweigh the possible benefits repeal would bring to American authors and publishers.

The following paragraph, which is at the bottom of page 19, is also from the 1966 report and has been picked up again in the 1974 Senate report, and I think it is of some importance:

The committee is aware that the concern on both sides is not so much with the present but with the future, and because new machines and devices for reproducing copyrighted text matter are presently in a stage of rapid development, the future in this area is unpredictable. Outright repeal of the manufacturing requirement should be accomplished as soon as it can be shown convincingly that the effects on the U.S. printing industry as a whole would not be serious. Meanwhile the best approach lies in the compromise embodied in section 601 as amended.

Mr. Drinan. Excuse me, Ms. Ringer. To what extent would that formal agreement in 1968 differ with section 601?

Ms. Ringer. The formal agreement in 1968 was based on 601 as it now exists, and I think that with some minor changes, both sides are really supporting it.

Mr. Drinan. It is substantially—

Ms. Ringer. Yes; it was basically directed at equating Canadian manufacture with U.S. manufacture, and this was the last of a series of compromises that were reached during this period, and it has held.

In other words, no one is breaking the line. There have been some suggestions for changes here and there, but basically, 1968 is essentially what you have in front of you.

Mr. Drinan. Well, you say when we had those people here earlier this year that they did not dig very deeply into the basic issues. Does

that mean that the basic issues have been resolved?

Ms. Ringer. No, because I think the Chairman asked the representative of the State Department on the second day of your hearings, would it be possible to phase this cut, and the answer was positive, and I think it was picked up by the representative of the Authors' League, and I would call your attention to the fact that this agreement is only among certain segments; it is not a universal agreement. The Authors' I eague representative did testify against the manufacturing claus in general, although he said he supported the compromise with a phaseout and with another amendment that I will come to. But, essentially, there is some disagreement and, obviously, the publishers and authors would like to see the thing gone, but they have, because of an evolutionary compromise during the 1960's, reached agreements which they are not prepared to abandon, and I think this is creditable, but I do not think these agreements are necessarily binding on you.

Anyway, one thing that happened—and I do not think it was really noticed as much at the time as it should have been—was that on October 14, 1966, 2 days after you reported the general revision bill in 1966, Congress passed a public law implementing the so-called Florence agreement, which is a UNESCO sponsored agreement, that in effect removed all U.S. tariff barriers on the importation of the great bulk of books and educational materials. They are just gone. So that in effect anybody who wanted to argue, well, let us do away with the manufacturing clause and put tariffs on books, could not do that anymore because after 1966 you cannot put any tariffs on books, and the extent to which you can put quantitative limitations is something I am going to come to. This is still an issue that I am afraid

you have to wrestle with.

The Senate Judiciary Subcomittee held hearings on section 601 5 days after the House passed the bill, and it was obvious that between 1965 and 1967 there had been a considerable coming together on this and that a compromise was within reach, and I will not try to paraphrase Mr. French's testimony, which is laid out at the bottom of page 20 and on all of 21, but I think it worth reading. It tried to express the way the compromise sat at that point, and essentially it was, nobody really likes this, but everybody is agreeing to it with one proviso, with one condition, and that is that you try to get Canada equated with the United States in terms of where manufacturing complies with the manufacturing requirement, and the reasons for this proposal are laid out in his testimony.

Now, everyone was uneasy with this. It was fine to say you had had a compromise, but no one really knew what the effect of this Canadian exemption would have, and Senator McClellan wrote to the Department of State, requesting its views in April of 1967, and the Department responded in September of 1967 in the negative. It took the view that the proposal presented serious, if not insurmounta-

ble, problems, legal problems, and would conflict with Government policy goals, which they described as "to maximize international trade through the most-favored-nation principle and to maintain the strength of the GATT organization." The State Department summarized its

position as follows:

"As long as the manufacturing clause remains a part of the copyright law, it would not be proper to except any nation from its provisions. We therefore would advise against the amendment proposed by" the book manufacturers. Now, the b-ok manufacturers took on this argument vigorously, and did a great deal to try to refute it and, as I tried to present later, it is not that clear. I think there are strong arguments on both sides, and I will try to, without bogging you down in the technicalities of the General Agreement on Tariffs and Trade, try to show what I mean. In any case, while all of this was going on, the book manufacturers and the publishers were seeking to find something formal in which to put forward this Canadian exemption, and they went to Toronto and had a meeting in February of 1968, and the Agreement of Toronto, which is a formal document, as reproduced here on page 24 and 25, was adopted. Essentially it involved an acceptance of 601 as it stood then with the addition of Canada to the United States, plus an agreement on the part of the Canadian representatives at this meeting to do everything they could to get the Canadian Government to accede to the Florence Agreement, which, I think, would be of considerable value to U.S. interests. And there was at that time a great international crisis in copyright which involved Canadian agreement to make common cause with the United States in trying to press our positions.

Rather than going through the lengthy legislative history of this, let me say that there have been some technical amendments by the Senate to section 601, which I will address, but by far the most important was the addition of Canada to the bill in the form in which it had been proposed, and that has held up, despite the State Department demurrer, and in the report explaining the change, the State Department opposition was not mentioned. It was repeated when the

State Department came here to testify on May 8.

Let me turn to page 28 and call your attention to the comparative summary of section 601 with the present law and the 1967 House version, and this runs over to page 31. I am a little reluctant to dig into the details of this unless you would like me to.

Mr. Kastenmeier [presiding]. In view of the hour, I think we can

pass over it.

Ms. Ringer. Mr. Chairman, I do not have to finish this chapter to-

day, but it would be nice if I could, so if I may press on.

We come to the primary question which is, should any manufacturing requirement be retained in the General Revision bill, and in this chapter, I have, perhaps unwisely, combined my background discussion of issues with my comments and recommendations, so everything is in here together in pages 32 to 52.

The first question is basically whether the manufacturing clause ought to be retained at all, and I quote what I thought was a very

apt statement from a 1959 law review article, saying that-

Compromise has been the bloodline of the manufacturing requirement. It was compromise that originally injected the clause into the law, and as demonstrated through its long history, it was compromise after compromise that sustained it. It is difficult to see how the remaining shell of the ouce powerful manufacturing clause can survive further revision of the act, as is presently contemplated.

In 1961 we found out that the shell was a little harder than we thought, but after 16 more years of further compromises, this comment remains apt. The manufacturing clause has never been defensible on principle, and of the many blots on our international copyright escutcheon it has traditionally been the biggest and the dirtiest. As it now stands, section 601 is far less objectionable than the present manufacturing requirement and its many predecessors, but the question remains: Do economic factors justify any provision conditioning the exercise of rights under a copyright upon the place where copies were manufactured?

As I mentioned just now, and I will repeat in summary, Mr. Kasteinmeier asked Mr. Biller on May 8 whether it might be useful for our purposes internationally to place a further restriction on this section, which could actually limit the effect of the manufacturing clause to a term certain, for example, 6 years, or some other specific period of time. Mr. Biller replied affirmatively. The Department of Com-

merce supported the view.

The Copyright Office is familiar with the process of compromise that produced the present text of 601. We believe that all those who participated in it deserve commendation for their reasonable attitudes and spirit of give and take. We also respect the willingness of various groups to remain committed to their agreements despite the passage of nearly a decade since the compromise began to emerge. Assuming that some sort of restriction on manufacture must remain in the copyright statute, the general approach of section 601 appears satisfactory.

At the same time, lest there be any doubt, we certainly support any effort to phase it out. We do think the time has come to think seriously about a phaseout. If, as Chairman Kastenmeier suggested, a terminal date for section 601 could be set now, it could provide a reasonable transitional period during which there could be an opportunity to study the actual economics of the situation during a time of great

technological change in book manufacturing.

Mr. Kastenmeier. In connection—if I may interrupt—with what you have said about various groups remaining committed to their various agreements, what I suggested was gratuitous. It was not the result of any one side, or any other side, or negotiations, but rather the perception, I think, shared by the Copyright Office in terms of the

long-term utility of this particular clause.

Ms. Ringer. Quite so. The technology of book manufacturing is going forward by leaps and bounds, and what I really started to say before was that in my opinion, the repropreof issue is not the hot issue it once was; because I do not think it makes that much difference any more. I think the economics of the industry, and obviously the impact of computerized book manufacture, are beginning to be felt, a... I think that perhaps we are really dealing with an anachronism here now, although I am not prepared to say this in the face of book manufacturers sitting here saying otherwise.

In any case, Mr. Karp, as I said before, was not a party to the agreement of Toronto, although the officers of his organization have ac-

cepted the compromise in general in the past. But he did testify to you on September 18, that the American author is the primary victim of the manufacturing clause, and is being whipsawed between two, in effect, special interests. He did question the constitutional justification of the manufacturing clause, and I do not dismiss this lightly.

But at the same time, he put forward two specific proposals.

The first was that section 601 should be made inapplicable to works by American authors first published abroad by foreign publishers. And his proposal, which includes a suggested amendment, is set forth here on pages 35 and 36. We agree with the principle of this proposal, though not necessarily with the language of the suggested amendment. What this would do, if it could be drafted properly, would be to limit the effect of the manufacturing clause to cases where American publishers choose, for economic reasons, to go to a foreign country to have their manufacturing done; as distinguished from the case where an American author cannot find any other publisher besides a foreign publisher to put his work before the public. And in those cases, Mr. Karp is arguing—and I think rather unanswerably on principle—that the author should not be caught in this bind.

I think it does on balance need to be said, however, that 601 is a

great liberalization of the present manufacturing clause.

Mr. Drinan. Excuse me, Mr. Chairman. Ms. Ringer, is there any hope that the UNESCO treaty, the Florence agreement, could be expanded into another treaty to take care not only of the tariffs, but also

of the quantity?

Ms. Ringer. Well, as a matter of fact, the approach is from a different angle. The Bern Convention, which we are not a member of, prohibits formalities such as the manufacturing clause out of hand to foreign works. Let me try to answer your question directly, because I

am not sure I am starting off right.

The Florence agreement is up for amendment next year. Maybe Ms. Schrader would want to address herself to this problem. I know she is familiar with it. Basically, the question is whether or not quantitative limitations, as distinguished from tariffs, are involved in the Florence agreement. I think they have not been traditionally. Am I right?

Ms. Schrader. That is right.

Ms. RINGER. The big question here is not Florence, but the General Agreement on Tariffs and Trade which the State Department says—and there is no question about it—is in spirit against this whole thing.

I had not meant to get into this area, but let me try now.

In other words, if we were joining the GATT today, we could not sustain the manufacturing clause. If we were enacting the manufacturing clause, we could not do it under the GATT. The GATT, which is a peculiar instrument, does allow exceptions for existing laws and liberalizations of them.

Mr. Drinan. But there is no way by which GATT can do our work for us?

Ms. Ringer. No, indeed, unfortunately; not unless you want to adopt a construction of it which would say, well, we just cannot continue this. It is so arguable the thing is so unclear, that I would not be comfortable with a flat position. We just cannot do this as a matter

of treaty law. It would be nice to say this, but I just cannot see it. I think if you are going to do away with it, you should just do away with it.

Mr. Drinan. Thank you very much.

Mr. Kastenmeier. When I resumed the Chair, you indicated you did not necessarily intend to complete chapter 14 today.

Ms. RINGER. That is right.

Mr. Kastenmeier. Then, could I encourage you to sum up to the point where you would like to? I do want to express my admiration for your ability, for over 2 hours, to engage in what is primarily a monologue—very difficult to do. It is very hard on any witness, and you have done beautifully, I must say. But I think—it is already 12:30, and we should not ask you to proceed much further at this late hour.

Ms. Ringer. Let me just say one more word about the rest of this section, which is up to page 38, and which involves a proposal by the Authors League to exempt periodicals and contributions to periodicals. And our feeling is that this really does run pretty solidly counter to the compromise, and we also doubt whether complete exemption would be necessary to protect the interests of individual authors in this particular situation. And we suggest some wording in the report that

would probably solve the problem.

Now, Mr. Lacy of McGraw-Hill wrote to me, and he has also, through the counsel for the American Publishers Association, I think, written to counsel on both the Senate and the House side concerning what I think is a legitimate concern about the way this would work out in practice. In other words, his assumption as to how the compromise would work when the books arrive on the dock, so to speak—and I think he has got a point, and I think they should be addressed, and I think we will be here too long if I try to get into this. I could either start with this rather technical point next time, or just make it and leave it for further consideration in markup, perhaps. Then, I would start again on page 38 next time.

Mr. Kastenmeier. All right, fine. Are there any closing questions?

Mr. Drinan. No. I just wanted to thank Ms. Ringer. This is better than any law school course that I had. I feel I should be paying tuition.

Ms. RINGER. Thank you.

Mr. Kastenmeier. I think that sums up the committee's viewpoint. I thank you again very much, Ms. Ringer. We will see you, if not before, on December 4 in this room at 10 a.m.

[Whereupon, at 12:36 p.m., the subcommittee recessed, to recon-

yene at 10 a.m. Thursday, December 4, 1975.]

COPYRIGHT LAW REVISION

THURSDAY, DECEMBER 4, 1975

House of Representatives,
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
of the Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:30 a.m., in room 2226, Rayburn House Office Building, Hon. George E. Danielson, presiding.

Present: Representatives Kastenmeier [chairman of the subcom-

mittee], Danielson, Drinan, and Pattison.

Also present: Herbert Fuchs, counsel, and Thomas E. Mooney,

associate counsel.

Mr. Danielson. The hearing will come to order. This morning we will hear further and probably finally from Barbara Ringer, the Register of Copyrights. Her appearance today marks the 18th session of the committee's public hearings on Copyright Law Revision.

The Chair notes that the Senate Committee on the Judiciary has: favorably reported the companion bill, S. 22, and prospects for the

enactment of a revision bill seem brighter than before.

At this time, the Chair announces that without any objection, the second supplementary report of the Register of Copyrights on the general revision of the U.S. copyright law will be printed and published as a committee print. There being no objection, it is so ordered.

Welcome again, Ms. Ringer. Will you proceed?

TESTIMONY OF BARBARA RINGER, REGISTER OF COPYRIGHTS, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL—Resumed

Ms. Ringer. Thank you very much, Mr. Chairman. When I broke off last time, I was in the middle of chapter XIV on the manufacturing clause, and I would like to pick up at that point, finish chapter XIV and XV, if possible, complete the rest of my comments on the report which would involve going back to chapter XIII involving rights in sound recordings, then picking up chapter XII on preemption and duration, chapter XIII on formalities and infringement, and chapter XV on the Copyright Office and the Royalty Tribunal. This would complete the entire report. You have all of these chapters now, and I am very pleased that the report will be printed. Needless to say I would like to update it so as to take account of recent developments. I will be editing and updating it in the next month or so, and I hope it will be ready for printing around Christmas time.

Mr. Danielson. That will be all right.

Ms. RINGER. In that case, I would like to start on page 38 of chapter XIV. Before doing that, I would just simply say to set the thing in context that there are two points that I have made so far with respect

to the manufacturing clause.

First, that section 601 is really a very substantial liberalization of present manufacturing requirements and, especially if certain further amendments were added to it, would represent a great improvement over the present law. But at the same time, I do believe the time has come to think seriously about phasing the clause out entirely and the Copyright Office would certainly favor that approach if the committee so decides.

The points raised on pages 38 and 39 are not of major importance, but I should note that, since the date of this report, there have been further discussions between the counsel for the American Association of Fublichers and the counsel for the Book Manufacturers Institute. As a result of these discussions, the Book Manufacturers Institute has withdrawn its proposal from an amendment, and I understand there is an agreement as to what the report might say on the point that is discussed here. I will not say any more about this rather technical matter, unless you would like to ask questions about it.

I will come immediately to the main point in this part of the chapter, which is the Canadian exemption, and I will read now from page 39. This point is discussed, Mr. Chairman, from pages 39 to 50 in the

report, and I am starting to read at page 39 from my report.

Whether manufacture in Canada should be equated with manufacture in the United States is probably the easiest question to state and the most difficult question to answer in the entire revision bill. Obviously, the Canadian exemption is a pivotal part of the compromise underlying section 601. It was accepted by the Senate. At the September 18, 1975, House Judiciary Subcommittee hearings there was no opposition to the exemption, and there was testimony by Mr. Van Arkel specifically in favor of it. He did refer to the fact that, under the so-called Toronto agreement, which I mentioned last time, there was an expectation that Canada would adhere to the Florence agreement, which would mean that tariff barriers with respected importation of books in Canada would be removed. The report in pages 41 to 44 attempts to lay out the present status of the dispute, and I will turn to page 45 in which I try to summarize this status.

No one is actually opposed to the Canadian exemption, considered solely on its own merits. All the private interests that have spoken on the matter favor it, either because they believe it advantageous or justified or because they regard it as a fundamental part of the manufacturing clause compromise. And, as I said, it should not be forgotten that a major part of the agreement of Toronto involved Canadian adherence to the Florence agreement, which would mean a complete withdrawal of tariff barriers to the importation of Ameri-

can books into Canada.

Opposition to the Canadian exemption is entirely governmental. The State Department opposed it on the ground that it violates U.S. international obligations and runs counter to U.S. trade policy. The Commorce Department agrees, though its statement suggests less certainty about the violation and more concern about unilaterally giving up trade preferences without first negotiating something in return.

The British Government wants the manufacturing clause deleted for all purposes, and it opposes any partial deletion that would, in effect, discriminate in favor of Canadian manufacture and against manu-

facture in the United Kingdom.

There is no question that, purely as a theoretical matter, the provisions of section 601 as a whole, including the discriminatory provisions in favor of Canadian manufacture, violate the spirit of U.S. foreign trade agreements and policy. Indeed, the mere concept of a manufacturing clause runs counter to the spirit of the whole range of post-World War II international agreements involving cultural interchange, including the various copyright conventions, the Florence and Beirut agreements on tariff barriers, and the recent final act of the Helsinki conference.

Section 601 could not be enacted as completely new legislation today, and this is a good thing. But Congress cannot write section 601 on a new, clean slate. As I have attempted to show in this chapter, the slate on which it must be written is older and messier and more unclear than anything else in the present copyright law. The Canadian exemption must be judged in its context, as the latest in a very long string of compromises that have produced the present manufacturing clause in section 601. The Copyright Office has sought to view the issue in this light, and assuming that section 601 must remain in the copyright law, at least temporarily, we have no practical or philosophical objection to making the Canadian exemption a part of it. The basic question which we must decide is whether or not the Canadian exemption actually violates the letter, as distinguished from the spirit, of the international obligations of the United States.

This is a very unclear question, and I have tried to lay out an analysis of it from the technical point of view on pages 47 to 50. I will now read from page 50, which expresses the conclusion that it is by no means certain that the State Department is correct in its interpretation of the prossions of the GATT, the General Agreement on Tariffs and Trade. Moreover, the manufacturing clause of the U.S. copyright law is an old familiar monster on the international scene, and section 601 will remove a great many more of the relatively few teeth it

still has.

Considering the doubt on the question and the very great liberalization of the manufacturing clause in the section 601 as a whole, the chances of one or more contracting states of the GATT making a formal protest over the Canadian exemption do not seem very great. These chances would be further reduced, I hardly need say, if section 601 were to be phased out entirely over a period of time.

I will go on to make a point on a different subject, and then unclude

the chapter if you would want to save your questions until then.

Mr. Danielson. No objection.

Ms. RINGER. The point arises from section 602, which is the importation provision and has nothing to do with the manufacturing clause. I simply wanted to alert you to something. I will read from page 51:

Within the past year or so, the British Lending Library at Boston Spa in England has become a major supplier of unauthorized photocopies of journal sticles to libraries throughout the world. This service is becoming very widely used by libraries in the United States. It can be assumed that the great majority of journal articles supplied by this service are copyrighted in the United States and that a large number of them are of American origin.

The activities of the British Lending Library could be considered a violation of section 108(g)(2) in its present form, if that section were applicable. But, under section 602, libraries are allowed to import up to five copies for ordinary library lending or archival purposes, even where the copies would have been considered piratical or unauthorized at the place where they were made.

If title 17 were applicable to such transactions, as a result, we would have a great many copies coming into this country that might have been made in violation of section 108(g)(2). All I am doing at this point is alerting you to the question, in relation to the general library photocoping problem, and I do think the subcommittee should con-

sider this problem when it comes to that section in the markup.

This concludes my presentation on this chapter, Mr. Chairman. Mr. Danielson. Thank you, Ms. Ringer. Mr. Drinan.

Mr. Drinan. Not at this time. I thank her for her presentation. I yield to you.

Mr. Danielson. Mr. Pattison. Mr. Pattison. No questions.

Mr. Danielson. One observation. If the manufacturing clause is not a violation of the letter of some things but is in violation of the spirit, are we to gain some comfort and peace of mind from that?

Ms. Ringer. I would say not.

Mr. Danielson. Is it better to violate the spirit or the letter? I was yielding to my spiritual consultant here.

Mr. Drinan. If I may, I wonder, Ms. Ringer, do you think that it

is hopeless for us to try to repeal that manufacturing clause?

Ms. RINGER. I would not say that it is hopeless, Mr. Drinan. We have reached the present stage through a long series of compromises, and I think the basic conclusion that I was trying to express in this chapter was that perhaps it would be radical, if not hopeless, to repeal it flatly out of hand right now. I would hope, however, that a terminal date could be put on it, because that would seem to be the within the realm of possibility.

Mr. Drinan. If we did, through some miracle, drop it in the subcommittee here, what would be the lobby that would be clawing at us? Ms. Ringer. The typographical unions.

Mr. Drinan. We might as well get the unions involved. Everybody else is involved.

Ms. Ringer. They are already involved, believe me.

Mr. Danielson. I have two comments which may be supplemental, at least to Father Drinan's here. I guess I am awfully simple or something, but I have trouble justifying a manufacturing clause on printed matter, and yet I have a lot of the clothing workers in my district. Apparently it is a bad thing to put a ban on the importation of foreign manufacture of clothing, but it is perfectly all right to put a ban on the importation of foreign manufactured printing. I have a little problem with that, and I would like help if you can give it. Maybe you cannot even give me any help.

Mr. Drinan. No. At the appropriate moment, I would be happy to

move to a ban, to drop the manufacturing clause.

Mr. Danielson. You and I may have a lot in common.

The other observation I am going to make—I had the high privilege this summer of accompanying the speaker through a tour of the socialist countries, and we were protesting that they would not allow enough of our books and magazines and printed matter in to their people, for their people to read, and it was shocking to find that they import 5 or 6 times as much, 500 or 600 percent as much printed matter into their countries as we import from them.

Frankly, I had no answer for that, but it is a factor we ought to consider. The flow of information ought to go in two directions, I

suppose.

Mr. Pattison. I might point out that it has been said that consistency is the hobgoblin of the small mind.

Mr. Danielson. Thank you very much. Let us move on to the next

point.

Ms. Ringer. The next point returns to chapter VIII, which is part of the material given to you this morning. The question covered concerns the exclusive rights in sound recordings, and on pages 1 through 13 of this chapter, I seek to review the evolution of this problem in the context of what is now section 114 of the revision bill and of H.R. 5345, which is your bill, Mr. Danielson, on performance royalties.

I will summarize those 13 pages very briefly by saying that in 1965 and 1966 through 1967, this subcommittee, the House Judiciary Subcommittee, accepted the principle of the copyrightability of sound recordings and proposed protection for these works against unauthorized duplication, but not against their unauthorized performance by radio, jukeboxes and music services. This was the status in 1967.

However, partly because of the testimony and the discussions that arose from the consideration of the bill at that time, in 1968 and 1969, performers unions and individual performers in the record industry joined together and pushed very hard for protection in the Senate. This was a new coalition, with a new cause, and a clear-cut goal. In the course of this effort, the opposition, or the concerns, of the traditional copyright owners—the songwriters and composers—began to be less evident. Perhaps it is an overstatement to say the opposition from these quarters evaporated, but certainly the feelings that had been expressed earlier were not being iterated. It is perhaps a bit of an exaggeration to say that the performing rights societies and the authors and composers favor, or strongly support, performance royalties with respect to sound recordings, but I think it is accurate to say they do not oppose them. And this is quite a change.

This was simply an evolutionary change in attitudes in what people look upon as in their best interests. As a result, Senator Harrison Williams introduced amendments in both 1967 and 1969 to establish a performance royalty in records. These were amendments directed to the revision bill, and in December 1969, the Senate Judiciary Subcommittee accepted the Williams' amendment, with some changes and it was in the bill until 1974, when it was knocked out on the Senate

floor when the bill passed the Senate.

As my report notes, it seems to me that the entire bill probably would not have passed the Senate with that provision in it. That is only supposition, though I am certain it would not have passed by 70 to 1 if the provision had not been deleted. From all appearances, it was the most controversial provision in the 1974 Senate bill.

Meanwhile, as you all know very well, the emergency presented by tape piracy, the proliferation of which caused Congress to enact first a temporary, and then a permanent amendment to the 1909 law granting exclusive rights against the unanuthorized duplication of

sound recordings.

Now, there are three issues in this chapter, and I think that we can dispose of two of them rather quickly. The first involves a proposal by the Justice Department, supported by the record industry and accepted by the Senate in the reported bill you just received, which essentially would give the owners of copyright in sound recording the right to make derivative works of them. We in the Copyright Office support this in principle, but we have some concerns about the language in which it is clothed in the Senate amendment and we would hope that perhaps a better formula could be found.

The second question involves the testimony that you heard from the tape duplicators, and others, concerning the possibility of a compulsory license for the duplication of sound recordings. And I would like to read from pages 22 and 23 of this chapter on this point, Mr.

Chairman.

The House Judiciary Subcommittee on July 17, 1975, heard testimony from Alan Wally, David Heilman and Thomas Gramuglia, representing tape duplicators. A point urged during this testimony was that a few very large record companies control the bulk of the records distributed, and that a huge number of recorded performances, going back several decades, are completely unavailable to the public because the "majors" will neither release them, license them, nor permit their unauthorized duplication. The witnesses urged that a compulsory licensing system be provided that would permit the public to have access to these old recordings and would generate royalties for the performing artists.

Without either accepting or rejecting any of the specific charges made in this testimony, the Copyright Office is convinced that a real problem exists with large and growing catalogues of recordings that record companies are sitting on and will neither release nor license. Unless voluntary licensing methods can be found for providing access to these recordings, it may well be that some kind of compulsory licensing system will eventually have to be devised to deal with the problem. While we have no specific recommendations for amendments in the bill, we do not feel that this problem can be swept under the rug. One constructive suggestion might be to mandate the copyright royalty tribunal, as part of its survey of the recording industry in connection with rate adjustments under section 115, to probe into the question of how serious this problem actually is.

Mr. Danielson. Let me interrupt if I may. We have not as yet your copyright royalty tribunal.

Ms. Ringer. That is right. Though it is in the bill before you, and I will discuss it in my testimony this morning, if time permits.

Mr. Danielson. As yet, it is just a concept.

Ms. Ringer. Right. What I am recommending, though, as part of this whole package—and I think I will come back to this when I discuss the tribunal later this morning—is that the tribunal would actually be able to go deeply into the economic and factual situations in these industries. It would have a subpens power, for example.

Mr. Drinan. Will the owner of the copyright under this circumstance have any right to go into court and compel the holder of the

copyright or the company to release the record?

Ms. Ringer. They certainly would not under the bill. We are not recommending that this be changed, but, on the other hand, there are very large catalogs that are not available to the public. If you have a book, and it is in libraries, people can get access to it and, in many cases, photocopy it rather extensively, but this is not nearly as true in the record industry. There is a large body of material there that is really pretty well kept out of the public's access.

Mr. Drinan. Did the original vocalist or the original performer in the contract that he made with Columbia Records, did he waive all of

his rights thereafter?

Ms. RINGER. I cannot say, Mr. Drinan. I think that, by and large, the individual performers did not have any continuing rights, although some major stars may well have retained rights.

Mr. Drinan. Thank you.

Mr. Danielson. That would be in the event there were a performance royalty.

Ms. Ringer. Yes.

Mr. Danielson. But as to access to the work of art, you still have a

continuing compulsory royalty situation.

Ms. RINGER. We are talking now about the duplication of actual recordings, and in this situation I do not believe that individual artists retain or necessarily ever had, the kind of rights which they could assert in court, to answer Mr. Drinan's question.

Mr. Danielson. Thank you.

Ms. RINGER. We now come to the question of performance royalties, and this is probably one of the most difficult in the bill. We do seem to have a confrontation on this issue.

I have tried to lay out the present situation and the arguments on pages 24 to 26 of the report. I did testify on July 24 in the Senate, and as stated on page 26, I do feel it necessary to recognize that we are at a dangerous impasse on this issue. But I still feel, speaking for the Copyright Office, that we cannot just temporize the needs to be confronted and dealt with.

I would like, since I did not testify at the same time as the group which testified on this issue, to give you the gist of my testimony inthe Senate, which by coincidence happened to occur the day after your subcommittee heard testimony on this.

I do agree fully with the fundamental aim of your bill, Mr. Daniel. son, to create within the framework of Federal copyright law a public performance right in sound recordings for the benefit of performers and record producers.

I am reading now from page 27:

Congress and the courts have already declared that sound recordings as a class are constitutionally eligible for copyright protection. With this principle

class are constitutionally eligible for copyright protection. With this principle established, any broadening of protection for sound recordings to include a public performance right becomes one not of constitutionality but of statutory policy. In considering this pivotal policy question, Congress should first take a hard look at just what the lack of copyright protection for performers has done to the performing arts profession in the United States. The 20th Century technological revolution in communications has had a fundamental impact on a number of forms of creative expression, but there is no case in which the impact was more drastic or destructive than that of the performing artist.

Performers were whipsawed by an unmerciful process in which their vast live audiences wee destroyed by phonograph records and broadcasting. But they were given no legal rights whatever to control or participate in any commercial

benefits of this vast new electronic audience.

The results have been tragic: The loss of a major part of a vital artistic profession and the drying up of an incalculable number of creative wellsprings. The effect of this process on individual performers has been catastrophic, but the effect on the nature and variety of records that are made and kept in release, and on the content and variety of radio programing, have been equally malign. Most of all, it is the laited States public that has suffered from this process.

Congress cannot repair these past wrongs, but it can and should do something about avoiding or minimizing them in the future. There is, in the United States today, no more vital and creative force than that of performed music. Adequate protection for those responsible for this creative force involves much more than economics and the ability or willingness of various communications media to pay performing royalties. It is, first of all, a matter of justice and fairness; but, beyond that, it is in the paramount national interest to insure that growth in the creativity and variety of the performing arts in this country is actively encouraged by reasonable protection rather than stunted or destroyed by the lack of it.

There are problems with the bill in its present form. It is cast in the form of an amendment to title 17 of the present law, and I do not think that it will quite work in that form. There is no doubt in my mind it could be made to work in another form.

It is less important whether the performance royalty for sound recordings be established under the revision bill, or through separate legislation, or just exactly how it is done, than that Congress act affirmatively by declaring itself in favor of the principle of such a payment. Whatever form the legislation takes, I recommend that such a step be taken by the present Congress and that, recognizing the damaging effects of legislative inaction in the past, it not again postpone this affirmative declaration to another Congress, or another

decade, or another generation.

At the same time it must be said that, on the basis of experience, if this legislation were tied to the fact of the bill for general revision of the copyright law, there is a danger that it could turn into a "killer" provision that would again stall or defeat omnibus legislation. This danger exists even more clearly than when I testified to this same effect last July, and would be very severe if the potential compulsory licensees—notably the broadcasting and jukebox industries—exerted their considerable economic and political power to oppose the revision bill as a whole. Should this happen, there could be no question about priorities. The performance royalty for sound recordings would have to yield to the overwhelming need for omnibus reform of the 1909 law.

I pass on now to page 29 of my statement, Mr. Chairman, in which I am trying to lay out some alternatives, because we do have a terrible

confrontation and impasse on this issue.

An obvious possibility would be for Congress to accept the principle of payment but delay implementation for a period long enough to allow the working out of a viable compulsory licensing procedure.

Another possibility would be, as in the case of the previous legislation on copyright for sound recordings, to put a termical date on the legislation, leaving it to a future Congress to judge on the basis of actual experience whether it should be extended permanently.

Other alternatives might include a transitional period during which all payments would go to the National Endowment for the Arts while a workable procedure for distributing license fees to individual copy-

right owners was being worked out.

I am not committed to any of these, and all I really wanted to say is what I expressed at the end of my statement, which is my hope that these alternatives and others might be worked out and explored in a spirit of goodwill and give and take, with the aim of providing a framework in which the fairest and least burdensome payment mechanism could be established.

That is the end of my chapter, Mr. Chairman.

Mr. Dantelson. Thank you, Ms. Ringer.

I have no questions on that.

Father Drinan?

Mr. Drinan. Thank you.

Ms. Ringer, I wonder if you could be a bit more affirmative or

declarative about the possibility of détente?

On page 29 you ask is it unrealistic to hope that the commercial users of music would sit down with their alleged enemies; is there any movement toward that?

Ms. Ringer. As a matter of fact, such movement has not been achieved. As a result of the hearing in the Senate, there was an effort on the part, as I am told, of the proponents of the legislation to meet with representatives of the broadcasters to discuss possible alternatives,

but no such meeting could be arranged.

Following that, as I indicated earlier in my statement, Mr. Galodner, representing the AFL-C1O council of professional employees, which is 20 national unions, wrote to Chairman Rodino stating that the council felt very strongly about the revision bill and, in effect, could not support it unless it contained a provision such as the old section 114 or the Danielson bill.

Mr. Drinan. I take it you felt that any head on clash between the AFL-CIO and all the people that follow them, all the unions you mentioned here, and the sound recording industry, that is a David and Goliath.

Ms. Ringer. It is not the sound recording industry; they are allied on this issue.

Mr. Drinan. This coalition.

Ms. Ringer. Yes. It is the broadcasting industry.

Mr. DRINAN. You feel they have more hopes than the others?

Ms. RINGER. I have no idea, Mr. Drinan.

Mr. Drinan. I am trying to figure out how strong they are. From all your past experience over the 10 years, you make a very effective case in my mind for performance royalties, and you depart from your usual objective, impartial way, and you state their case very strongly. I am persuaded.

Let us hope that the détente you speak about on page 29 could

happen.

Mr. Danielson. Would you ask the Register of Copyrights which way would the public interest best be served?

Mr. Drinan. I think she has made it very clear. I will quote her

beautiful prose. She can speak for herself. She speaks so well.

This is beautiful. "The results have been tragic: The loss of a major part of a vital artistic profession, the drying up of an incalculable number of creative wellsprings. The effect of this process on individual performers has been catastrophic, but the effect on the nature and variety of records that are made and kept and released, on the content and variety of radio programs, has been equally malign. Most of all, it is the United States public that has suffered from this process."

Mr. Danielson. Her words with your baritone voice was good.

Mr. Pattison?

Mr. Patrison. No questions.

Mr. Danielson. Thank you. You have answered those questions.

Ms. RINGER. I would pass on now to chapter XII which involves Federal preemption and duration of copyright.

Let me say, first, Mr. Chairman, that at one time, this was unquestionably the most controversial and debated issue in copyright revision.

This has not, however, been true for at least 10 years and probably quite a bit longer than that. I believe that the concept of a single Federal system of copyright is now almost universally accepted. There was no opposition to this concept in your hearings in 1975. The question of duration is still an issue, but I think if it is looked at in perspective, it should not be regarded as major.

I would leave you in no doubt, Mr. Chairman, as to my own feelings on this, which are very strong, and that is that the term of life of the

author plus 50 years is the very heart of this revision bill.

Returning to the chapter as I have written it, the provisions I am discussing are summarized briefly on pages 2 through 3, and on pages 4 through 7 I attempt to discuss the present status of section 301, and I return to that now.

The Federal preemption provision in the bill has stayed pretty much the same since the early 1960's. What has happened is the result of a series of decisions by the courts, including the Supreme Court, which have had a sort of roller coaster effect with respect to Federal preemption, but which under the present law, as I think most people interpret it, requires some technical changes in section 301. These were drafted by various members of the copyright bar, and were adopted in the Senate version. The Copyright Office endorses them.

I do not think I need to go into the details of this except on one point, which must be discussed at some length, and this is set out as issue No. 2 in chapter XII of the draft report: should sound recordings fixed before February 15, 1972, be made to an exception to the Federal preemption presented by section 301? Let me read from page 10.

A unique and difficult problem is presented with respect to the status of sound recordings fixed before February 15, 1972, the effective date of the amendment bringing recordings fixed after that date under Federal copyright protection. In its testimony before the House Judiciary Subcommittee on May 8, 1975, the Department of Justice pointed out that under section 301, as then written, "this language could be read as abrogating the antipiracy laws, nov existing in 29 States relating to pre-February 15, 1972 sound recordings, on the grounds that these statistics prescribe activities violating rights 'equivalent to * * * the exclusive rights within the general scope of * * *.'" Certainly such a result cannot have been intended for it would likely affect the immedate resurgence of piracy of pre-February 15, 1972 sound recordings.

The Justice Department pointed out this would not apply to recordings after February 15, 1972. Therefore, they recommended that these pre-1972 recordings simply be exempted from the effect of preemption. In other words, left under either Federal, or under State common law or statutory protection. The Senate Judiciary Committee adopted this suggestion and the Senate report which you received this morning states so, on this point. At the present time 32 States prohibit record piracy by statute and far more do so under common law.

The Congress and many States have determined that record pirates unfairly appropriate the property, efforts and capital, of the legitimate music industry. There is no justification for exposing pre-1972 record-

ings to expropriation by record pirates.

The result of this amendment would be to leave pre-1972 sound recordings as entitled to perpetual protection under State law while post-1972 recordings would eventually fall in o the public domain as provided in the bill. The Copyright Office regnizes that under recent court decisions most pre-1972 recordings are protected by State statute and common law and that they should not all be thrown into the public doman instantly upon the coming into effect of the new law. However, we cannot agree that they should, in effect, be accorded perpetual protection as under the Senate amendment.

A possible solution would be to revise clause (4) [the new provision in the bill] to establish a future date for the preemption to take effect. This date—perhaps a bit breathtaking—might be February 15, 2047, which is 75 years from the effective date of the statute extending Federal protection to recordings. That sounds like a long time, but I would only point out that it is in comparison to eternity, on the length of term.

I do not make a big point of this. I try to lay out in the first part of the chapter the arguments that have been put forward with respect to lengthening the term, in principle and of the life plus 50 term, in particular. This has been a long-debated issue and is something on which we have very strong feelings. I will read from page 12:

Although the length of the term of copyright, as provided in the bill, was challenged by the Department of Justice, the National Education Association and certain tape duplicators at the 1975 House hearings, no real issue was made of the question of duration. The life-plus-50 term is strongly favored by a wide range of interests and it seems clear that it is accepted by most others. The Copyright Office considers it the foundation of the entire bill.

The last point in this chapter, Mr. Chairman, is not really very important and I would like to skip over it, if I may.

Mr. Danielson. Surely. Ms. Ringer, are there any questions? Mr.

Drinan.

Mr. Drinan. Simply on page 8-I am not certain I understand what

the new law provides with respect to the renewal of copyrights.

Ms. Ringer. The renewal provision is dropped entirely for works coming under the copyright law after the effective date of revision bill. There are provided under chapter 2, and also under chapter 3 to some extent, provisions under which individual authors can recapture their copyrights, by termination of transfers. One element of the present renewal system is preserved in the bill, in a somewhat different form for subsisting copyrights in their first to m on the effective date of the new law. The provision uses exactly the and language as under the present law, which was preserved because of the fact that there have been enormous amounts of trafficking in contracts for future interests with respect to renewals:

Mr. Drinan. Are you satisfied with what is stated about renewal in

S. 22?

Ms. Ringer. Yes.

Mr. Danielson. Mr. Pattison. Mr. Patrison. No questions.

Mr. Danielson. This is a good point to suspend for a few moments. We have a rollcall vote on an amendment to the tax law, and we are going to have to leave in a minute anyway, so we will recess. I respectfully request that my colleagues come back as soon as possible; perhaps, we can enable Ms. Ringer to conclude her testimony today then,

but we must go now to vote so we will stand in recess for about 10 to 15 minutes.

[A brief recess was taken.]

Mr. Kastenmeier, (chairman of the subcommittee). The subcommittee will come to order.

I regret to make an announcement—it has to do with procedure on the floor that will make it impossible for us to continue, at least beyond

this segment. I do not think other members will ... returning.

The procedure adopted is that each of these very important amendments on the tax reform bill will be debated for 10 minutes, and then there will be a formal vote. So I would propose to ask Ms. Ringer to sum up as to where you were before, anticipating, perhaps, 10 minutes or so we will have another vote. We will then conclude for the morning, and we will reconvene on next Thursday, or at such other time that is convenient. If it is necessary to call another meeting it will probably be on next Thursday, probably at 9:30 in the morning.

At this time of year we tend to be running into House sessions, unfortunately running concurrently with our own hearing. Should there be a need for another meeting, we can judge that following the con-

clusion of Ms. Ringer's remarks.

Ms. Ringer?

Ms. RINGER. Mr. Chairman, may I suggest that perhaps I can finish even in 10 to 15 minutes if I skim quite a bit over what I have here.

The next chapter is formalities in infringement, and these are mostly technical questions. I have eight issues laid out, and I think that really only two of them need be addressed directly by way of summary.

Mr. Kastenmeier. Had you concluded the discussion of Copyright

Royalty Tribunal? Ms. Ringer. No.

I thought this is the very last major issue I wanted—I think if I can get onto the last chapter, chapter 15, I can cover the fee bill—yeur bill to raise the fees, and other purposes of the Reyalty Tribunal

very quickly, and perhaps that might be sufficient.

Perhaps it would be simple enough to simply skip over chapter 13 on formalities and infringement, simply noting we would recommend that some improvements be made in the deposit provisions—the provisions for deposit of copies of phonorecords for the Library of Congress, and to note that the Senate has adopted some fairly extensive revisions in the criminal infringement section dealing with seizure and forfeiture, consistent with the Justice Department's testimony on May 8.

Unless you want me to go into anything further in that chapter, I will pass right on to chapter 15, and discuss only the fee bill and the

Royalty Tribunal.

I am well aware that the Royalty Tribunal is one of the major issues in the bill. If you would prefer to continue the testimony on that later,

Mr. Chairman, I will be entirely at your disposal.

On the fee bill, discussed on pages 4 to 12 of the chapter, I think that I can summarize what I want to say by simply urging this subcommittee, if at all possible, to enact this separate legislation in advance of general revision, as soon as possible.

vance of general revision, as soon as possible.

The bill does three things: It would raise the fees, which have not been raised since 1965, and which presently recover less than 40 percent

of our costs. I might say in that context that, in 1965, when your subcommittee took the initiative to raise the fees the last time, the figure was around 64 percent. So we are falling very badly behind in that

regard, and it is getting worse.

Mr. Kastenmeier. In that connection, are you urged by any other source, such as Office of Management and Budget, or the librarians, or any other source, to bring fees in line with some historic guidelines in terms of fees with respect to services?

Ms. Ringer. Mr. Chairman, all I can say is that the subject is dis-

cussed every year at the Appropriations Committees.

Mr. Danielson. I would like to ask a question there.

What do you feel, Ms. Ringer, would be—this is arbitrary, but where

do you suppose would be an equitable place to place the fee?

My feeling is that the fee should pay for the service, but I recognize that there will be situations in which the person seeking the protection for some reason or another ought to receive some aid in connection

Where do you feel it ought to go?

Ms. Ringer. We have always felt that 70 percent was a reasonable

I think what we are proposing will probably bring in a little less than that, but one should consider that the copyright system includes the deposit of valuable copies, as well as actual monetary fees. And while the valuations that are placed on these copies are obviously not exactly what you would get if you went out on the street and tried to sell them, the Library is acquiring them without going out and buying them. So, this is a factor which, if added to the fees received, does bring us to over 100 percent recovery of costs. And I think this creates a situation in which you have some flexibility.

The position we have taken, Mr. Danielson, as you have described, is to avoid placing fees any higher than is reasonably necessary for an effective registration system. They should not constitute a burden on anyone, nor deter those seeking who want to get registration from

obtaining it.

This is our position. I think the fees that are in the bill—both in the revision bill as reported by the Senate, and Mr. Kastenmeier's

separate bill—are satisfactory for that purpose.

Similarly, the bill would also anticipate two major changes in the registration procedure. It would permit the voluntary registration, of a number of unpublished works which are not registrable under

present law, and would also allow some group registrations.

The Author's League, for obvious reasons, has not been very enthusiastic about the fee increase. Nonetheless, it is now seeking just as strongly as we are, to have separate legislation enacted because of the other reform elements that are in this bill, which would be of substantial benefit to individual authors. From a purely bureaucratic point of view, this would enable us to t e care of some big procedural changes, well in advance of gene at revision. We would have them out of the way by the time we had to absorb the major impact of the full revision bill.

Mr. Drinan. I note, Ms. Ringer, on page 12, that the separate bill is not lying in the Senate. They blanketed these reforms in S. 22. Canwe get a separation in the Senate?

Ms. Ringer. The assurances I have are purely oral, Mr. Drinan, but I have been told by staff on the Senate Judiciary Committee that, if the House passes the bill, as soon as the revision bill is out of the way in the Senate nothing would stand in the way of Senate acceptance of the separate legislation.

I think the feeling was that they did not want to have this interfering with the ongoing progress of the revision bill at this par-

ticular time, but there is no substantive opposition to it.

Mr. Drinan. Thank you.

Ms. RINGER. Let me go on to the Royalty Tribunal, which obviously

is an extremely important subject for your subcommittee.

The evolution of the concept of the Royalty Tribunal is traced on pages 12 through 20 of this report, and obviously I cannot go into the details of this. The tribunal is not just somebody's bright idea; it did evolve from a series of events which can be traced progressively.

In 1967, your subcommittee reported a bill which did not require a Royalty Tribunal, because there was, I believe, a conscious effort to try to structure the compulsory licenses in the bill so as to avoid this

kind of Government activity.

But what the House did on April 11, 1967, by knocking out the cable provisions which had been reported by your committee, and by changing the concept of the jukebox compulsory license, set the scene for something that was almost inevitable: the development of some sort of Royalty Tribunal. Perhaps the simplest thing I can do is skip right to the end, Mr. Chairman, and state what I think might be done with the Royalty Tribunal.

What we are saying is that on the basis of—this is on pages 28 through 30—on the basis of the summary of the development of the bill, and what is now facing the tribunal, it is a necessary conclusion that the proliferation of compulsory license systems mandates

the establishment of a Royalty Tribunal.

In the aggregate, the duties they seem likely to be called upon to perform are simply too large, complex, and specialized to be handled de novo by Congress and the courts. The Copyright Office believes that if chapter 8 were enacted in its present form, it would probably with-

stand a direct challenge to its constitutionality.

We now have an exchange of memos between Professor Gellhorn and Professor Pollack. The Gellhorn-Pollack papers, which both deal with the question of constitutionality through in quite different terms do not clearly settle the question of constitutionality or unconstitutionality. However, implicit in both papers is the feeling that you could rertainly make the tribunal unequivocally constitutional by certain amendments.

We do suggest several, and they fall under four categories: Administrative structure, standards for determinations, timetables, and judicial review. If I may try to summarize this very briefly, we think that the tribunal should probably have a permanent staff; that it should have continuity and not be as ad hoc as is laid out in the bill at the moment. Turning to the standards, with each compulsory license the Royalty Tribunal has to deal with, there should be specific standards.

This is, I think, one of the most important aspects of resolving any constitutional doubts with respect to the tribunal.

The question of judicial review is also important in this context, and I think there is a growing feeling that judicial review, for the rate-making adjustments, is highly desirable. In a memorandum which you received from Mr. Valenti, of the Motion Picture Producers Association, a suggestion is thrown out, which is based on the Postal Service's ratemaking activities and which may be quite applicable to this situation. Basically, instead of authorizing either House of Congress to veto the rate adjustment or otherwise consider it, you would permit the rate ruling to go directly to the courts, whose review would not be de novo, but rather would be on the basis of the record that had been made in the Royalty Tribunal. These would be safeguards that, I think, would probably satisfy the complaints that were made.

This is very sketchy, Mr. Chairman, but I hope this is sufficient to

conclude the hearings.

Mr. KASTENMEIER. Thank you.

Are there any questions? If not, there is a vote pending, and we will consider these hearings to be closed, save a review of what we have had. Should such review indicate we require further enlightenment we can make arrangements to have another hearing day, but you have at least gone over all the material and it has been extremely valuable. I am only sorry that we could not have had all of our membership here for these meetings.

Should this be the last hearing date, I would think we would need no more official proceedings of this subcommittee in connection with the subject of copyright this year, but obviously early next year we will again return to the subject. And we thank you, Ms. Ringre.

Ms. RINGER. I want to thank you, Mr. Chairman, and the subcom-

mittee for your courtesy and patience. Thank you very much.

Mr. Kastenmeier. The committee stands adjourned.

[Whereupon, at 11:45 a.m., the subcommittee adjourned, subject to the call of the Chair.]

APPENDIXES

APPENDIX 1

During October, 1975, the Teleprompter Corporation, which had contributed testimony on the cable television issue in June, submitted a memorandum, an explanation of proposed amendments to Sections 111(d) and 111(e) of H.R. 2223, and a Memorandum Considering the Constitutionality of Proposed Copyright Legislation (H.R. 2223).

This submission, plus a number of responsive submissions by other interested parties and an amplification of the proposal of Teleprompter, were received in November, 1975. In alphabetical order, the submissions responsive to Teleprompter are as follows:

Ad Hoc Committee of Concerned Cable Television Operators for a Fair Copyright Law (Frederick W. Ford).

George J. Barco (Pennsylvania Cable Television Association). CATA (Richard L. Brown).

CBS (Robert V. Evans).

Motion Picture Association of America, Inc. (Jack Valenti).

National Association of Broadcasters (John B. Summers). National Broadcasting Company, Inc. (Robert Hynes).

National Collegiate Athletic Association (John Coppedge).

National Cable Television Association (Rex. A. Bradley).

David O. Wicks, Jr. (Becker Communications Associates).

In 1976 the subcommittee received a further proposal from the National Association of Broadcasters, a letter from ABC Television Affiliates Association, and a memorandum of April 13, 1976 designated "Agreement between NCTA and MPAA as to terms of copyright legislation."

These various proposals, submissions, and documents constitute Appendix

1 to the hearing record.

MEMORANDUM OF TELEPROMPTER CORPORATION

EXPLANATION OF PROPOSED AMENDMENTS TO SECTIONS 111(d) AND 111(e) OF H.R. 2223

Attached hereto is a redraft of the royalty provisions (and related definitions) contained in Section 111 of the proposed Copyright Bill. This redraft, in Teleprompter's opinion, is a more equitable and rational approach to the problem of copyright liability than that currently found in the bill.

Also attached is a memorandum of law prepared by Professor Ernest Gellhorn of the University of Virginia Law School. This memo: Lum argues that the provisions relating to the establishment of the Royalty Tribunal, as now set

forth in H.R. 2223, are seriously vulnerable to constitutional attack.

Before describing in detail what we have attempted to do in our proposed redraft, a few words of background may be useful. Teleprompter's basic position is that there should be no côpyright liability of any sort for cable television retransmission of broadcast signals. Everyone seems to agree that, as a matter of pure logic, there is no justification for imposing copyright liability on cable's retransmission of local signals. The real question of copyright liability has always concerned cable television's importation and retransmission of "distant broadcast signals." However, retransmission of distant broadcast signals actually is a benefit to the originating station which is able to gain additional advertising revenues by virtue of its reaching distant markets via cable. These additional advertising revenues enable the originating station to pay copyright owners more than it otherwise would be able to. Therefore, allowing the copyright owner to collect copyright payments when the cable system in the distant market retransmits the copyrighted program would enable the copyright owner to extract a windfall double payment.

This is the position that Teleprompter has urged in its testimony before the Subcommittee on Courts, Civil Liberties and the Administration of Justice and in various meetings with individual members of the Subcommittee. We believe this position is logically sound and deserves support. However, we fear that, for whatever reason, our position mar not be adopted by the Subcommittee. We therefore are submitting a compromise proposal which we believe corrects the

most glaring deficiencies of H.R. 2223.

Basically, what we have done is to build on the distinction between local and distant signals referred to above. As many others have done before us, we have proposed elemination of copyright liability for the retransmission of local signals. We have gone somewhat further, however, in also proposing that there be no copyright liability for the retransmission of network programming. The reason for this is that the entire nation is really "local" to the network. That is, a copyright owner who sells his product to a network anticipates that it will beviewed throughout the entire country and is compensated accordingly. Thus, thereis no need for the cable system to pay the copyright owner a second fee when it enables his programming to reach certain isolated communities which, because of terrain problems or gaps in the placing of affiliated stations, would not otherwise have received such programming.1

Having decided that, if there should be any copyright liability at all, such liability should be only with respect to the non-network programming of distant

stations, we then confronted the following two questions:

 What percentage of total cable revenues should be available for copyright payments?

2. How much is each distant signal worth for copyright purposes?

As to the first question—how much of the cable industry's revenue should be available for copyright payments—we propose, in the interest of compromise, to use the same percentage as applies to television stations. In other words, if in a given year all television stations paid 28% of their total revenues for programming costs then, under our proposal, 28% of each cable television system's total revenues would also be potentially subject to copyright liability.

In passing, we wish to state that adopting the same percentage for programming costs as is applicable to the broadcasting stations seems to us extremely generous for two reasons. First, capital costs of the able industry are much greater than those of the broadcasters who, at no cost to them, are able to utilize immensely valuable and scarce spectrum space. Therefore, the cable industry has less money available than do the broadcasters to pay for programming. Second, using the same percentage as the broadcasters completely ignores the benefit to the originating station (and thus to the copyright owner) of cable's carriage of distant signals.3 However, in order to come up with a formula which both sides can agree upon we have decided to adopt without change the model of the broadcasters.

We now turn to the second question—namely, how much is a distant signal worth for copyright purposes. In our opinion, earlier attempts to answer this question have been hindered by the assumption that all imported signals are of the same value to the cable system. Clearly this is not true and once we recognize that it is not true the solution to the problem becomes much simpler. What we suggest therefore, is that copyright payments be made for the non-network programming on each imported signal on the basis of the popularity of that programming in the market in which the cable system is located.

Thus, under our formula, the non-network programming on each signal which is distant to a particular cable system would be entitled to receive a percentage of that cable system's revenues in accordance with the following computation:

Cable system's revenues for retransmission of broadcasting signals times a percentage which is equal to the percentage of total broadcasting station revenues.

¹ In the vast majority of cases, the FCC's non-duplication rules require that the network programming of imported network channels be "blacked out" when the signal is retransmitted by the cable system. In these cases, therefore, the question of copyright payment for the network programming of imported network affiliates does not even arise.
¹ The percentage of total revenues which the broadcasters pay for programming is easily ascertainable by the FCC on a yearly basis.
² Even though copyright owners contend that the benefit to them of distant signal carriage is outweighed by the detriment, they cannot claim that this carriage is without any benefit to them.
¹ Most of this information is even now being collected by the two national rating services and the balance of the information can be easily obtained. Thus, there is no difficulty in getting the data needed for application of our formula.

which are spent on programming costs times the popularity of the non-network. programming of the distant signal in the county in which the cable system is lo-

cated, expressed as a market share percentage.

The working of this formula is illustrated by the following example. Imagine-a cable system with quarterly revenues for the basic service of retransmitting broadcast signals of \$500,000 which imports two distant non-network affiliated signals (stations A and B). If station A has a 5% share of the market in which the cable system is located and station B has a 3% share, and if the most recent available information indicates that all broadcast stations pay 28% of their revenues for programming costs, then the quarterly copyright liability of the cable system with respect to the programming on each of stations A and B would be determined as follows:

Station	Cable system basic subscriber revenues	Multiplied by percentage of their total revenues which broadcast- ing stations spend for programing	Multiplied by pop- ularity of imported, nonnetwork pro- graming expressed as a market share- percentage
AB.	\$500, 000	28	5.
	500, 000	28	3.

This works out to a \$7,000 quarterly fee for the programming on Station A and a \$4,200 quarterly fee for the programming on Station B. Qverall the quarterly fee is \$11,200 or 2.24% of the cable system's basic subscriber revenues.

We believe that this proposal is far more equitable than the one now contained in H.R. 2223 because it is directed at what is conceded by all concerned to bethe crux of the problem—namely cable's importation of distant signals.

An additional, but by no means incidental, virtue of our approach is that, since it is entirely based on actual relationships in the real world, it is automatically self-adjusting. There is thus no need to resort to the ill-conceived Copyright Royalty Tribunal to make periodic adjustments which, because they are unrelated to any clearly expressed Congressional purpose or to any known set of criteria, are bound to be arbitrary. In this connection, it is worth considering carefully Professor Gellhorn's memorandum concerning the dubious constitutionality of the proposed statutory provisions establishing the Tribunal.

TELEPROMPTER CORPORATION. [October 1975].

- (d) Compulsory License for Secondary Transmissions by Cable Systems.—
 (1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall at least one month before the date of the secondary transmission or within 30 days after the enactment of this Act, whichever date is later, record in the Copyright Office, a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it together with the name and location of the primary transmitter, or primary transmitters and thereafter, from time to time, such further information as the Register of Copyrights shall prescribe by regulation to carry out the purposes of this clause.
- (2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, during the months of January, Apri', July, and October, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation—
 - (A) A statement of account; covering the three months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers to the cable system, and the gross amounts paid to the cable system [irrespective of source and separate statements of the gross revenues paid to the cable system for advertising leased channels, and cable casting for which a per program or per channel charge is made and by subscribers for the basic service of providing secondary transmissions of primary broadcast transmitters; and

(B) A total royalty fee for the period covered by the statement, computed Lon the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing

secondary transmissions of primary broadcast transmitters, as follows:

(i) ½ percent of any gross receipts up to \$10,000;

(ii) 1 percent of any gross receipts totalling more than \$40,000 but not more than \$80,000:

(iii) 1½ percent of any gross receipts totalling more that \$80,000, but

not more than \$120,000;

(iv) 2 percent of any gross recipts totalling more than \$120,000, but

not more than \$160,000; and

(v) 2½ percent of any gross receipts totalling more than \$150,000. by multiplying the cable system's gross receipts from subscribers for the basic service of providing secondary transmissions of primary broadcast transmifters during said period by a percentage which is the product obtained by multiplying the copyright owners' percentage share by the aggregate of the markets shares of each copyright qualifying broadcast station whose signal is retransmitted by the cable system.

(e) Definitions.-

As used in this section, the following terms and their variant forms mean the the following:

A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when

the performance or display was first transmitted.

A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: Provided, however, That a nonsimultaneous further transmission by a cable system located in a television market in Hawaii of a primary transmission shall be deemed to be a secondary transmission if such further transmission is necessary to enable the cable system to carry the full complement of signals allowed it under the rules and regulations of the Federal Communications Commission.

A "cable system" is a facility, located in any State, Territory, Trust Territory or Possession that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d) (2) (B), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

The "local service area of a primary transmitter" comprises the area in which a television broadcast station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules and regulations of the

Federal Communications Commission.

The "copyright owners' percentage share" shall be that percentage which is derived from dividing (A) total annual gross revenues of all broadcast stations in to the total program expenses for all broadcast stations and (B) multiplying the resulting quotient by 100. The copyright owners' percentage share shall be certified on a quarterly basis by the Federal Communications Commission to the Register of Copyrights in accordance with the most recently available broadcast financial data collected by such Commission.

The "market share" of each "copyright qualifying broadcast station" not affiliated with a national television network (commercial or non-commercial) shall be derived by (A)dividing the total number of viewer hours credited to the copyright qualifying broadcast station with respect to the county or counties in which the cable system is located by the total number of viewer hours credited to all stations (whether carried over-the-air or by cable) in such county or counties and (B) multiplying the resulting quotient by 100. The market share of each copyright qualifying broadcast station which is affiliated with a national television network (commercial or non-commercial) shall be derived by (A.) dividing the total number of viewer hours credited to the non-network programming of the copyright qualifying broadcast station with respect to the county or counties in which the cable system is located by the total number of viewer hours credited to all stations (whether carried over-the-air or by cable) in such county or counties and (B) multiplying the resulting quotient by 100. The market shares of each copyright qualifying broadcast station shall be certified on a quarterly basis by the Federal Communictions Commission to the Register of Copyrights on the basis of the most recent data available to such Commission.

A "copyright qualifying broadcast station" shall be any broadcast station whose signal is not required to be retransmitted by the cable system pursuant to the rules and regulations of the Federal Communications Commission in effect at the time of enactment of this bill, provided, however, that a broadcast station which is thereafter required by the rules and regulations of said Commission to be retransmitted by said cable system shall not thereafter be deemed to be a copyright qualifying broadcast station.

MEMORANDUM CONSIDERING THE CONSTITUTIONALITY OF PROPOSED COPYRIGHT LEGISLATION (H.R. 2223)

INTRODUCTION

A bill to revise the copyright laws is now pending before the Judiciary Committee of the House of Representatives. This bill, H.R. 2223, would impose for the first time a general requirement of royalty payments for secondary transmission of broadcast signals by cable television systems. It would establish a statutory royalty rate and also create a Copyright Royalty Tribunal with extensive authority to regulate this royalty structure. Specifically, the Tribunal would have power to review and reset the statutory royalty rates paid by cable television operators to copyright holders, and to resolve disputes concerning distribution of royalty proceeds among copyright holders.

This memorandum considers the constitutionality of these primary provisions of H.R. 2223 dealing with the Copyright Royalty Tribunal. It concludes that H.R.

2223 is seriously defective for three reasons:

First, the expansive grant of power to the Tribunal to reset the statutory royalty rates is not accompanied by meaningful guidelines for the exercise of

that power.

Second, this absence of legislative criteria for agency decision-making would not be cured by subsequent agency definition of its own standards. The Structure of the Copyright Royalty Tribunal is such that it would not be capable of transforming its vague statutory mandate into intelligible public policy. Nor is the opportunity for veto by either House of the Congress of Tribunal decisions an effective substitute for defined congressional or administrative policy.

Third, H.R. 2223 would sharply and unwisely curtail judicial review of Tri-

bunal decisions.

These three aspects of the proposed legislation—the absence of statutory standards for exercise of the Tribunal's authority, the structural constraints against specification of standards by the Tribunal itself, and the curtailment of judicial review—are not unrelated. Each contributes to a disturbing potential for arbitrary decision-making. Each undercuts any expectation that the Copyright Royalty Tribunal could be held politically or legally accountable for the proper discharge of its responsibilities. Consideration of the cumulative effect of these three defects reveals the unwisdom of H.R. 2223 as presently drafted. And legal analysis of these defects suggests that the bill, if passed in its present form, would be subject to serious attack on constitutional grounds.

I. THE ABSENCE OF STATUTORY STANDARDS

Section 111 of H.R. 2223 would require operators of cable television systems to file a "notice" with the Register of Copyrights within 30 days of passage of the bill and thereafter to file quarterly statements of account. Royalties would be assessed on the basis of these statements. Copyright owners would be given an annual opportunity to file their claims with the Register. If there were no inconsistency among the statements and claims filed, the Register would be entitled to distribute the royalty fees deposited with him to the copyright owners or their designated agents.

Sections 801-09 of the bill define the role of the Copyright Royalty Tribunal. As stated in § 801(b), the Tribunal has two functions. First, it exercises the allimportant power to make adjustments (beginning in 1977) in the royalty rates and even the rate base specified in § 111 of the bill. Second, the Tribunal is authorized to resolve controversies concerning distribution of royalty fees deposited with

the Register of Copyrights.

These grants of power are not accompanied by legislative directives to guide the Tribunal in exercising that power. Section 801(b) only states that the Tribunal should adjust copyright royalty rates "so as to assure that such rates are reasonable. . . ." The section provides no criteria for determining reasonableness. The bill treats the word "reasonable" as if it were, standing alone, an intelligible guide to decision-making. In fact, the word describes only a quality of judgment, not its content. The word says nothing whatever about the factors to be considered in reaching a decision no. about the policies or objectives that the decision should further. Nor is it apparent from other provisions in the bill what a "reasonable" royalty figure or rate would be or how that determination should be made.¹
What is eminently "reasonable" for cr., purpose may be quite "unreasonable"

for another, yet H.R. 2223 specifies no statutory purpose to guide the Copyright Royalty Tribunal. There is no enumeration of factors, no indication of the relative importance to the public of one consideration or another, and no specification of the ultimate objective or objectives in light of which reasonableness

may be ascertained.

In short, the word "reasonable," when used without explication as the sole standard for agency action, is no standard at all. The Copyright Royalty Tribunal would be left to set royalty rates without any meaningful guidance from the legislature, and both Congress and the public would therefore lack any sound

basis for evaluating the Tribunal's performance of its tasks.

At one time not long ago this delegation of legislative authority without meaningful criteria for its exercise would have rendered the statute uncoustitutional under the delegation doctrine. The vesting of all legislative authority in the Congress by the Constitution was construed first to prevent the legislature from delegating law-making power and, when this proved impractical, then to require that every delegation at least be accompanied by a policy statement for measuring the lawfulness of its administration. Thus, in the 1930's the Supreme Court on two occasions invalidated congressional action on this basis. See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1936). However, the delegation doctrine has not been to overturn any public regulatory scheme since then.

In the ensuing years, the Court has upheld broad and ill-defined delegations of legislative authority, albeit not without misgivings and limitations. As judicial hostility to bread delegations of legislative power has subsided,² the courts no longer rely on the "delegation doctrine" as an explanatory label in constitutional adjudication. See K. Davis, Administrative Law Text § 2.04 (3d ed.

~1972).

This is not to say that the judicial concerns underlying the early delegation decisions have been abandoned. They have not been. They have been recharacterized as components of due process, a constitutional standard to which the

-courts continue to require strict adherence.

These underlying judicial concerns are essentially two: promotion of agency accountability and prevention of agency arbitrariness. Invalidation of legislation that delegates power to administrative agencies without specific standards for the exercise of that power is one way of promoting accountability for administrative agencies. Modern courts are fully cognizant to the intimate relation between the delegation inquiry and the concept of accountability:

"Concepts of control and accountability define the constitutional requirement. The principle permitting 2 delegation of legislative power, if there has been a sufficient demarcation of the field to permit a judgment whether the agency has kept within the legislative will, establishes a principle of accountability under which compatibility with the legislative design may be ascertained not

¹ Should the Tribunal. for example, favor adequate rewards for those producing creative material, focus on protecting existing distribution mechanisms, or stimulate wider public access to ideas and information? These goals are not mutually consistent in all situations and some may not reflect the unstated congressional purpose.

² But see National Cable Television Ass'n v. United States, 415 U.S. 336, 842 (1974) reading the Independent Offices Appropriation Act of 1952 "narrowly to avoid [these delegation] problems."

only by Congress but by the courts and the public." Amalgamated Meat Cutters, Etc. v. Connally, 337 F. Supp. 737, 746 (D.D.C. 1971) (Leventhal, J.).

Recent decisions indicate that accountability may be obtained by requiring that the agency itself articulate and adhere to substantive criteria in the discharge of its administrative responsibilities. Thus, the judicial focus has snifted from demanding specificity of congressional authorization to requiring ascertainable standards for agency action. The result is that agency performance rather than legislative delegation is increasingly the critical standard.

The other value that finds constitutional expression in the due process guarantee is the prevention of arbitrariness in decision-making. This too was part of the delegation inquiry. The early decisions invalidating legislation in the name of that doctrine suggest that the fatal defects in those statutes were the combinations of indefinite delegations of legislative power with inadequate procedural safeguards for those likely to be affected by the statutes. Recent decisions seek the same end but take a somewhat different (more practical) approach. They dispense with reliance on the delegation doctrine and focus directly on procedural protections surrounding agency power and the availability of judicial review to ensure that those procedural safeguards are following in a particular case. See, e.g., Leventhal, Principled Fairness and Regulatory Urgency, 25 Case W. Res. L. Rev. 66, 70 (1974) ("The contemporary approach is one not of invalidating even the broadest statutory delegations of power, but of assuring that they are accompanied by adequate controls on subsequent administrative behavior.").

Thus, the historic judicial concern with standardless delegations of legislative power has not vanished. It has developed into two modern notions that may fairly be termed successors to the delegation doctrine: first, that agencies should articulate and follow intelligible standards for exercising the powers delegated to them; and, second, that the exercise of such powers should be confined by procedural safeguards and policed by judicial review. Both of these notions find constitutional basis in the guarantee of due process of law.

With this understanding, it becomes evident that the constitutional defects of H.R. 2223 are not erased by the shift of focus from delegation to due process. Not only does this bill propose a virtually standardless delegation of authority to the Copyright Royalty Tribunal; it also offends modern notions relied upon in promoting agency accountability and preventing arbitrariness.

II. THE COPYRIGHT BOYALTY TRIBUNAL AND THE CONCEPT OF ACCOUNTABILITY

Where the Congress has not supplied specific directions for agency action, courts increasingly look to the agencies themselves for definition of rules and standards that confine agency power and guide its discretionary exercise. See, e.g., United States v. Bryant, 439 F.2d 642, 652 (D.C. Cir. 1971); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971).

But the Copyright Royalty Tribunal is singularly ill-suited to that task. Under \$ 801 the Tribunal would be established in the Library of Congress. Unlike most administrative bodies, the Tribunal would not have a stable membership of persons appointed for fixed terms. Instead, the Tribunal would consist of shifting panels of three members, selected on an ad hoo basis by the Register of Copyrights from a list provided by the American Arbitration Association. § 803. These panels would be constituted as needed to consider petitions to adjust royalty rates and disputes concerning distribution of proceeds. There would be no continuity of personnel and hence no opportunity for individual Tribunal members to develop expertise in the field. The perpetually amateur status of individual members and the continual changes in Tribunal membership would preclude development by the Tribunal of consistent principles and policies to guide its decisions. The structure of the Tribunal is fundamentally at odds with the expectation that legislative delegation of power without standards can be cured by agency articulation of standards to guide itself.

³ Leading commentators have applauded this development. See, e.g., K. Davis, Administrative Law Text §§ 2.02-.10 (3d ed. 1972).

⁴ Of. State v. Traffic Telephone Workers' Federation, 66 A. 2d 616, 626 (N.J. Sup. Ct.

<sup>1949):
&</sup>quot;The personnel of the board of arbitration under the statute will vary with each strike. There is no permanence in the various boards of arbitration which may be constituted in successive cases. There is, thus, an even greater need of specific standards than there would be in the case of a continuous administrative body which might gather experience as it went along."

This defect is exacerbated by selection of members of the Copyright Royalty Tribunal from membership of the American Arbitration Association. These persons are experienced arbitrators and are undoubtedly well qualified to act as such. But arbitration is by nature an exceedingly ad hoc method of dispute resolution. As a mechanism for decision-making, it values expediency over predictability and sacrifices long-term policies to immediate resolution of disputes. Arbitration involves no tradition of adherence to precedent or to some consistent principle of decision. It treats each case on its own bottom and therefore evolves no reliable way to handle future cases.

In short, the Copyright Royalty Tribunal as constituted under H.R. 2223 is institutionally incapable of converting its vague legislative mandate into a set of meaningful standards to guide its own decisions. To discharge an undefined policy, H.R. 2223 designates an administrative body incapable of defining a policy for itself. The inevitable result would be an endless series of ad hoc decisions made without identifiable objectives and therefore not susceptible of informed evaluation by Congress, courts, or the public. The goal of agency accountability is lost, and the statutory scheme is rendered unnecessarily vulnerable to constitut onal attack.

Nor is the absence of public and legal accountability remedied by § 807(a) which provides the Tribunal adjustment of statutory royalty rates may be denicd effect by adoption of an unfavorable resolution in either House of the Congress. This procedure for congressional veto supplies no standards for guidance of the Tribunal.

Congressional disapproval would provide no basis for ascertaining whether other rate adjustments were reasonable. At most the availability of such a veto would be a theoretical political check on arbitrary adjustments; as a practical matter, it seems unlikely that Congress would be in a position to exercise continuous and careful oversight of Tribunal decisions. Moreover, such congressional action could be objectionable as an unconstitutional effort to legislate without Presidential approval. However viewed, this negative congressional control of Tribunal royalty rates would provide no assurance that any adjustments were reasonable—and not arbitrary and capricious.

III. JUDICIAL REVIEW UNDER H.R. 2223 AND AGENCY ARBITRARINESS

The central meaning of the constitutional guarantee of due process of law is the provision of adequate procedural safeguards against arbitrary or capricious government action. In the content of administrative law, due process requires not only that the agency itself follow certain regular procedures designed to ensure fairness to interested parties, but also that the agency's decisions be subject to judicial review for procedural error and abuse of discretion. See, e.g., L. Jaffe, Judicial Control of Administrative Action 381-89 (1965). Thus, the notorious judicial reluctance to construe a statute so as to preclude entirely judicial review can best be explained as a desire to avoid confronting a constitutional defect in congressional action.

Ultimately, both the specification of substantive standards for agency decision-making and the provision of procedural safeguards and judicial review are interlocked barriers against government arbitrariness. Without ascertainable criteria for the exercise of agency discretion, there is no reference by which to identify abuse of discretion. See, c.g., Yakus v. United States, 321 U.S. 414, 425-26 (1944). In other words, without some articulated objectives for agency action, it is impossible to determine whether a given decision is an arbitrary imposition of government power against a particular party or an official policy of general applicabilty.

Thus, it has long been recognized that an important aspect of the delegation doctrine is to ensure that procedural safeguards, including judicial review of agency action, do not become empty formalities. As a recent and leading case stated:

"The safeguarding of meaningful judicial review is one of the primary functions of the doctrine prohibiting undue delegation of legislative powers. That this element of the doctrine . . . has current vitality is brought out by the observation of Justice Harlan in Arizona v. California, 373 U.S. 546, 626 (1963); '[The doctrine] prevents judicial review from becoming merely an exercise at large by providing the Courts with some measure against which to judge the official action that has been challenged." Amalgamated Meat Cutters, Etc. v. Connally, 337 F. Supp. 737, 759-60 (D.D.C. 1971).

The pending bill allows the use of fair procedures by the Copyright Royalty Tribunal, but it makes grossly inadequate provision for judicial review. In fact,

H.R. 2223 is apparently intended to preclude altogether judicial review of statutory royalty rate adjustments and to curtail sharply judicial review of royalty fee distributions.

Whether the absence of judicial review for Tribunal adjustments of copyright royalty rates is, in itself, a constitutionally fatal defect is difficult to say. It is not doubtful, however, that this preclusion of judicial review seriously compounds the problems of a standardless delegation of legislative power and an administrative body incapable of developing its own standards. When this denial of judicial review is conjoined with the failure (either in the legislation or in the subsequent Tribunal decisions) to establish specific criteria by which the Tribunal is to adjust statutory royalty rates, the constitutional infirmity of the legislation becomes apparent. As written, the bill provides no assurance that such adjustments will be made on a reasoned basis and will not be arbitrary and capricious.

CONCLUSION

These three defects—the absence of meaningful statutory standards, the structural constraints against articulation of standards by the Tribunal itself, and the curtailment of judicial review-are cumulative. They combine to strip this proposed statutory scheme of reliable protections against arbitrary decision-making. They combine to render the Copyright Royalty determinations effec-tively beyond the reach of judicial and public scrutiny. As presently drafted, this proposed legislation is unwise and unnecessarily vulnerable to constitutional attack under the due process clause.

ERNEST GELLHORN, Professor of Law, University of Virginia, Charlottesville, Va. October 14, 1975.

> PITTMAN, LOVETT, FORD, & HENNESSEY, Washington, D.C., November 14, 1975.

Hon. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee, 2137 Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I appreciate the opportunity to comment on the alternative method of dealing with the cable issue in H.R. 2223 proposed by TelePrompTer Corporation. TelePrompTer Corporation is certainly to be commended for its efforts to find a solution to this issue.

Before commenting on the proposal, I would like to reaffirm the testimony which I gave before the Subcommittee last June on behalf of the Ad Hoc Committee of Concerned Cable Television Operators for a Fair Copyright Law. In keeping with that testimony, I urge that Section 110 of the bill be amended by adding subsection 8, exempting cable television from the bill, deleting all of Section 111 and amending chapter 8 on the Royalty Tribunal to exclude cable television. Appropriate amendments are attached.

Even if the Committee does not accept these amendments, cable television should be eliminated from the present bill as premature until such time as regulatory legislation is enacted and the full facts surrounding the initialling of the "Consensus Agreement" are developed on the record.

The Office of Telecomunications Policy at the White House, and the Federal

Communications Commission are both drafting proposed regulatory legislation for cable television. I understand Congressman Torbert H. Macdonald has announced that he plans hearings on regulatory legislation for cable television next year.

It is still our view that H.R. 2223 should be enacted, but that the provisions on cable should be deferred until Congress establishes its policy on cable television. Until that is done, the structures of the industry and the regulatory scheme is unknown. The present copyright legislation, by its nature, establishes communications policy. (See Senate Report No. 93-1035, 93rd Cong., 2nd Sess., on S. 1361 p. 66.) After Congress adopts legislation for the regulation of cable television and the regulatory structure of the industry is established, it will be appropriate for the first time to consider copyright legislation on cable television. Moreover, many members of Congress believe that the industry has agreed, through the so-called "Consensus Agreement", to the payment of copyright. The full facts concerning how that "Consensus Agreement" was obtained on November 10, 1971 by divises and business compulsion, including threats by a White

her 10, 1971 by duress and business compulsion, including threats, by a White House staff member, of a blood bath for cable if it did not agree to copyright,

should be developed so that Congress will be fully informed on how that "consent" was obtained.

Turning now to the TelePrompTer proposal, our basic objection is that it includes the legislative fiction that receiving and distributing a broadcast signal by a cable television system is a performance. This is contrary to the reason and logic of the United States Supreme Court in both Fortnightly Corporation v. United Artists, 392 U.S. 390 (1968), and TelePrompTer Corporation v. C.'S, 415 U.S. 394 (1974). The proposal recognizes the validity of the principles established by the Court (that carriage of such signals is not a performance) only in areas in which broadcast stations have the right to insist on carriage under the ECC's Rules. This right varies with market size and distance from the reference point of the market or the contour in which the system is located. It would seem that, if carriage of a signal is not a performance within the Grade B contour of a station, outside all 35-mile zones under the Commission's Rules (possibly as far out as 79 miles) where there is a right to insist on carriage, it logically would not be a performance within the Grade B contour of a major market station which cannot insist on carriage by systems outside of its 35-mile zone.

There is really no basis to hold carriage of a station on a cable system to be a performance other than the 28 owners of most of the copyrighted material on television want to collect a second time from the public—once through the advertiser and a second time through the cable operator. The Commission's power to limit the number of distant signals carried on a system has been sustained. No further power is needed to protect both the broadcaster and the copyright owner.

As I understand the TelePrompTer proposal, its fundamental thrust is that no copyright liability will attach to the carriage by cable television systems of any network program broadcast by either a local or a distant signal on the theory that the copyright owner dedicates a network program to the entire country. It also exempts non-network programs carried by stations which are entitled to insist on carriage under the FCC Rules. These Rules on carriage are arbitrary with respect to major markets and areas outside the 35-mile zones of all markets. In order to be consistent with that theory on dedication, a copyright owner who sells a non-network program to a television station must intend for an agreed price, to dedicate that performance to the entire public within the Grade B contour of the station and as far beyond as it can be received off-the air. The type antenna used by the public, be it rabbit ears, rooftop, independent tower on CATV, is immaterial to the price the copyright owner receives. In order to eliminate arbitrary discrimination against the public, based on the size of market in which the cable system is located, it would seem that the definition of "copyright qualifying broadcast station" in the proposal should be revised to reflect the principles above described.

There are a number of other problems with the definitions in the proposal. For example, in the definition of "copyright owners percentage share" the total program expense is part of the formula. A number of the nine items listed under program expense, Schedule 2 of the Annual Financial Report of Networks and Licensees of Broadcast Stations, FCC Form 324, do not appear to be related to copyright. These items include salaries of talent, salaries of other program employees and a catch-all of all other program expense. Moreover, the items involved included under this heading may be changed by the FCC from time-to-time. A copy of the FCC Form 324 is included for your information.

One of the difficulties with the definition of "market share" in the proposal is the implied statutory approval of whatever rating service the Commission may now use or may use in the future. Different rating services may come into existence. Therefore, standards for selection of a service by the FCC should be developed with an opportunity to contest the ratings used by submission of ratings by other rating services.

Based on these hurried comments, it is doubtful whether or not sufficient data can be accumulated in these various areas and their effect on different systems determined quickly enough to evaluate the proposal. The above comments underline the necessity to eliminate cable from H.R. 2223. In any case, cable should be eliminated from the present bill and deferred until regulatory legislation is completed and further study is given to the TelePrompTer proposal.

Sincerely.

FREDERICK W. FORD,

Counsel for the Ad Hoc Committee of Concerned

Cable Television Operators for a Fair Copyright Law.

§ 110. Limitations on exclusive rights: Exemption of certain performances and displaus

Notwithstanding the provisions of section 106, the following are not infringe-

ments of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made:

(2) performance of a nondramatic literary or musical work or display of a

work, by or in the course of a transmission, if:

- (A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and
- (B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for:

- (i) reception in classrooms or similar places normally devoted to instruction.
- (ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of

their official duties or employment;
(3) performance of a nondramatic literary or musical work or of a dramaticomusical work of a religious nature, or display of a work, in the course of services

at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if:

(A) there is no direct or indirect admission charge, or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of his objections to the performance under the following conditions:

(i) The notice shall be in writing and signed by the copyright owner or his

duly authorized agent; and

(ii) The notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for his objections; and

(iii) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public:

(6) performance of a nondramatic musical work in the course of an annual agricultural or horticultural fair or exhibition conducted by a governmental body or a nonprofit agricultural or horticultural organization:

(7) performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work and the performance is not transmitted beyond the

place where the establishment is located.

(8) the further transmitting to the public, by means of broadcast receiving equipment, wherever located, which receives and makes available by means of cable or wires and related equipment to individual reception sets of the kind commonly used in private homes, of a transmission embodying a performance or exhibition of a work; Provided: The further transmission is made simultaneously and without altering or adding to the content of the original transmission and no direct admission fee is charged for the privilege of seeing or hearing such transmission and the receiving apparatus is not coin operated.

CHAPTER 8 .-- COPYRIGHT ROYALTY TRIBUNAL

801. Copyright Royalty Tribunal: Establishment and purpose.

802. Petitions for the adjustment of royalty rates.

803. Membership of the Tribunal.

804. Procedures of the Tribunal.

805. Compensation of members of the Tribunal; expenses of the Tribunal.

806. Reports to the Congress.

807. Effective date of royalty adjustment.

808. Effective date of royalty distribution.

809. Judicial review.

§ 801. Copyright Royalty Tribunal Establishment and purpose

(a) There is hereby created in the Library of Congress a Copyright Royalty Tribunal.

(b) Subject to the provisions of this chapter, the purpose of the Tribunal shall be: (1) to make determinations concerning the adjustment of the copyright royalty rates specified by section § 111 115 so as to assure that such rates are reasonable and in the event that the Tribunal shall determine that the statutory royalty rate, or a rate previously established by the Tribunal, or the revenue basis in respect to section 111 does not provide a reasonable royalty fee for the basic service of providing secondary transmissions of the primary broadcast transmitter or is otherwise unreasonable, the Tribunal may change the royalty rate or the revenue basis on which the royalty fee shall be assessed or both so as to assure reasonable royalty fee; and (2) to determine in certain circumstances the distribution of the royalty fees deposited with the Register of Copyrights under section § 111 116.

§ 802. Petitions for the adjustment of royalty rates

(a) On July 1, 1977, the Register of Copyrights shall cause to be published in the Federal Register notice of the commencement of proceedings for the review of the royalty rate specified by section § 111 and 115.

(b) During the calendar year 1984, and in each subsequent fifth calendar year, any owner or user of a copyrighted work whose royalty rates are specified by this title, or by a rate established by the Tribunal, may file a petition with the Register of Copyrights declaring that the petitioner requests an adjustment of the rate. The Register shall make a determination as to whether the applicant has a significant interest in the royalty rate in which an adjustment is requested. If the Register determines that the petitioner has a significant interest, he shall cause notice of his decision to be published in the Federal Register.

§ 803. Membership of the Tribunal

(a) In accordance with Section 802, or upon certifying the existence of a controversy concerning the distribution of royalty fees deposited pursuant to section § 111 and 116, the Register shall request the American Arbitration Association or any similar successor organization to furnish a list of three members of said Association. The Register shall communicate the names together with such information as may be appropriate to all parties of interest. Any such party within twenty days from the date of said communication is sent may submit to the Register written objections to any or all of the proposed names. If no such objections are received, or if the Register determines that said objections are not well founded, he shall certify the appointment of the three designated individuals to constitute a panel of the Tribunal for the consideration of the specified rate or royalty distribution. Such panel shall function as the Tribunal established in section 801. If the Register determines that the objections γ the designation of one or more of the proposed individuals are well founded, the Register shall request the American Arbitration Association or any similar successor organization to propose the necessary number of substitute individuals. Upon receiving such additional names the Register shall constitute the panel. The Register shall designate one member of the panel as Chairman.

(b) If any member of a panel becomes unable to perform his duties, the Register, after consultation with the parties, may provide for the selection of a successor in the manner prescribed in subsection (a).

§ 804. Procedures of the Tribunal

(a) The Tribunal shall fix a time and place for its proceedings and shall cause notice to be given to the parties.

(b) Any organization or person entitled to participate in the proceedings may appear directly or be represented by counsel.

- (c) Except as otherwise provided by law, the Tribunal shall determine its own procedure. For the purpose of carrying out the provisions of this chapter, the Tribunal may hold hearings, administer oaths, and require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of documents.
- (d) Every final decision of the Tribunal shall be in writing and shall state the reasons therefor.
- (e) The Tribunal shall render a final decision in each proceeding within one year from the certification of the panel. Upon a showing of good cause, the Senate Committee on the Judiciary and the House of Representatives Committee on the Judiciary may waive this requirement in a particular proceeding.

§ 805. Compensation of members of the Tribunal; expenses of the Tribunal

- (a) In proceedings for the distribution of royalty fees, the compensation of members of the Tribunal and other expenses of the Tribunal shall be deducted prior to the distribution of the funds.
- (b) In proceedings for the adjustment of royalty rates, there is hereby authorized to be appropriated such sums as may be necessary.
- (c) The Library of Congress is authorized to furnish facilities and incidental service to the Tribunal.
- (d) The Tribunal is authorized to procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code.

§ 806. Reports to the Congress

The Tribunal immediately upon making asfinal determination in any proceeding for adjustment of a statutory royalty shall transmit its decision, together with the reasons therefor, to the Secretary of the Senate and the Clerk of the House of Representatives for reference to the Judiciary Committees of the Senate and the House of Representatives.

§ 807. Effective date of royalty adjustment

- (a) Prior to the expiration of the first period of ninety calendar days of continuous session of the Congress, following the transmittal of the report specified in section 806, either House of the Congress may adopt a resolution stating in substance that the House does not favor the recommended royalty adjustment, and such adjustment, therefore, shall not become effective.
 - (b) For the purposes of subsection (a) of this section
- (1) Continuity of session shall be considered as broken only by an adjourn-
- ment of the Congress sine die, and
 (2) In the computation of the ninety-day period there shall be excluded the days on which either House is not in session because of an adjournment of more
- than three days to a day certain.
 (c) In the absence of the passage of such a resolution by either House during said ninety-day period, the final determination by the Tribunal of a petition for adjustment shall take effect on the first day following ninety calendar days after the expiration of the period specified by subsection (a).
- (d) The Register of Copyrights shall give notice of such effective date by publication in the Federal Register not less than sixty days before said date.

§ 808. Effective date of royalty distribution

A final determination of the Tribunal concerning the distribution of royalty fees deposited with the Register of Copyrights pursuant to sections 111 and 116 shall become effective thirty days following such determination unless prior to that time an application has been filed pursuant to sections 809 to vacate, modify or correct the determination, and notice of such application has been served upon the Register of Copyrights. The Register upon the expiration of thirty days shall distribute such royalty fees not subject to any application filed pursuant to section 809.

§ 809. Judicial review

In any of the following cases the United States District Court for the District of Columbia may make an order vacating, modifying or correcting a final determination of the Tribunal concerning the distribution of royalty feesFCC Fem 324 December 1974

1974

FORM APPROVED OMB NO. \$2:R0008 LINES 20-24 SCHED. APPROVED BY

	5 C S S S S S S S S S S S S S S S S S S						
ANNUAL FINANCIAL REPORT OF NETWORKS AND LICENSEES OF BROADCAST STATIONS							
Mail one copy to the FEDERAL COMMUNICATIONS COMMISSION, Washington, D. C. 20554							
R2FORE FILLING C	OUT THIS REPORT, SEE INSTRUCTIONS						
ι							
1	(NAME OF RESPONDENT)						
3. Indicate the station(s) for which this report is submitted:	N) (CITY) (STATE) (ZIP CODE)						
Current Call Letters	(OTHER CALL LETTERS OF STATION DURING REPORTING YEAR, IF ANY)						
Focation.	DO NOT REMOVE THE MAILING LABEL AFFIXED BELOW						
(COUNTY)	RETURN COPY WITH MAILING LABEL TO THE FCC. RETAIN THIS COPY						
(STATE)	TO THE FCC. RETAIN THIS COPY FOR YOUR FILES.						
4. Type of station reporting: takeak one							
TV □ TV	AF Combined AM and FM						
TV TV Satellite TV Combined TV and Satellite	FA FM affiliated with AM in same area FM Ir lependent						
AM AM	☐ International						
5. If this report does not cover the full cale	ndor year, indicate the period covered: From:To:						
	NY FIRST)						
OR CHECK IF NOT AFFILIATED (IND)							
1. Licensee also owns the following	stations for which separate reports are filed:						
Cull Letters Type of S	Station* Call Letters Type of Station*						
*Indicate the type of station (See ite	m 4 above)						
Do not write below this line:							
9.	7.						
	-1- RETURN COPY WITH MAILING LABEL						

FCC Form 324 December 1974 1974

FORM APPROVED OMB NO. \$2-R0005 LINES 20-24 SCHED. 2 APPROVED BY QAO/B-180227(R000 t)

ANNUAL FINANCIAL REPORT OF NETWORKS AND LICENSEES OF BROADCAST STATIONS						
Mail one copy to the FEDERAL	COMMUNICATIONS COMMISSION, Washington, D. C. 20554					
BEFORE FILLING O	UT THIS REPORT, SEE INSTRUCTIONS					
1.						
2	INAME OF RESPONDENT)					
3. Indicate the station(s) for which this report is submitted:	I) (CITY) (STATE) (ZIÞ CODE					
Current Call Letters	(OTHER CALL LETTERS OF STATION DURING REPORTING YEAR, IF ANY)					
Location:	DO NOT REMOVE THE MAILING LABEL AFFIXED BELOW					
(COUNTY)	RETION COPY WITH HALLING LARFL					
(STATE)	RETURN COPY WITH MAILING LABEL TO THE FCC. RETAIN THIS COPY FOR YOUR FILES.					
:	·					
4. Type of station reporting: tcheck one TV TV TV TV Satellite TV Combined TV and Satellite AM AM	AF Combined AM — FM FM allihated ' W in same area FM Independer. International					
5. If this report does not cover the full cales	ndar year, indicate the period covered. From:To:					
6. Network affiliation(s) of station: IPRIMAR	IY PIRSTI					
OR CHECK IP NOT APPILIATED (IND)	·					
7. Licensee also owns the following : Call Letters Type of Si	stations for which separate reports are filed; tation* Call Letters Type of Station*					
*Inds ne type of station (See item 4 above)						
Do not write below this line:						
1	7. A. RETURN COPY WITH MAILING LABEL					

1974

SCHEDULE 1. BROADCAST REVENUES USE THIS COL JMN FOR YOUR TOTAL-ING ONLY MAKE ENTRIES IN THIS COLUMN FIRST LINE NO. CLASSIDE BROADCAST REVENUES (omit cents) (b) (c) (o) \$ ς A. REVENUES FROM THE SALE OF STATION TIME: 2 (1) Network Sale of station time to network s: 3 Sale of station time to major networks, ABC, CBS, MBS, 4 5 Sale of station time to other networks (before line of Total (lines 4 + 5) 6 (2) Non-network (after trade and special discounts but before cash discounts to advertisers and spongers, and before commissions to agencies representatives and brokers). Sale of station time to national and regional advertisers of 8 Sale of station time to local advertisers of sponsors (4)(40). Q 10 11 Total sale of station time (lines 6 + 13) B. BROADCAST REVENUES OTHER THAN FROM SALE OF 12 STATION TIME (after deduction for trade discounts but before cash discounts and before commissions): (1) Revenues from separate charges made for programs, materials, facilities, and services supplied to advertisers or sponsors in connection with sale of station time; (a) to national and regional advertisers of sponsors . . 14900. 13 14 15 Total broadcast revenues, other than from time sales (lines 16 17 18 (but not to staff salesmen or employees) and less cash 19 D. NET BROADCAST REVENUES (lines 17 minus line 18) Report here the total value of trade outs and barter transactions. This 20 value must also be included as sales in the appropriate lines above. 21 If this is a report for a joint AM-I M operation, indicate below the amount, if any, of total broadcast revenues in line 19 which is applicable separately to the FM station: 22 FM revenues from sale of station time (after discounts, commissions, etc.).....(17:24).
FM revenues from providing functional music or other special 23 24 Other FM revenues 25

ALL	1.1	ž ¥	T E	RS	

•	SCHEDULE 2. BROADCAST EXPENS	ES	
LINE NO.	CL ASS OF BROADCAST EXPENSES	MAKE ENTRIES IN THIS COLUMN FIRST (omit cents)	YOUR TOTAL.
	(o)	(b)	(c)
1 2 3 4	TECHNICAL EXPENSES: Technical payroll*		\$
5 6 7 8 9 10 11 12 13 14	PROGRAM EXPENSES: Payroll* for employees considered "talent" Payroll* for all other program employees Records and transcriptions Cost of outside news services Payments to talent other than reported in line (6) Music-license fees Other performance and program rights All other program expenses Total program expenses		
16 17 18 19	SELLING EXPENSES: Selling payroli*. (65:73) All other selling expenses		
20 21 22 22a 22b 23 24 25	GENERAL AND ADMINISTRATIVE EXPENSES: General and administrative payroll* Depreciation and amortization (25-32) Interest Allocated costs of management from home office or affiliate(s) Other general and administrative expenses (33-49) Total general and administrative expenses TOTAL BROADCAST EXPENSES (lines 4 + 15 + 19 + 24		
*Payn	oll includes salaries, wages, bonuses and commissions.		

	SCHEDULE 3. BROADCAST INCOME	
LINE NO.		AMOUNT (omit cents)
1	Broadcast revenues (from Schedule), line 19)	\$
2	Broadcast expenses (from Schedule 2, line 25)	
3	Broadcast operating income or (loss) (line 1 minus line 2)	
4	Total of any amounts included in line 2 above which represent payments (salaries, commissions, management fees, rents, etc.) for services or materials supplied by the owners or stockholders, or any close relative of such persons or any affiliated company under common control (see page 3 of instructions)	
5	Note: If no such payments were made, check here	

			_			-
CALL	LET	TER	15 -	 	 	

SCHEDULE 4. EMPLOYMENT									
LINE NO.			•						
1									
2	Full-Time	Part-Time	Total						
	(17-24)	(25-3	21						
	(Do not count as "part-time" those employees who worked a full week but whose duties were divided between two or more stations of the licensee. Allocate those employees between the stations in accordance with instructions for Schedule 4 (pg. 4)).								
SCHEDULE 5. TANGIBLE PROPERTY OWNED AND DEVOTED EXCLUSIVELY TO BROADCAST SERVICE BY THE RESPONDENT									
			As of December 31						
LINE NO.	ltem (a)	Total Cost (omit cents)	Balance in occrued depreciation account (cmit conts)	Cost after depreciation (Col. (b) minus (c)) (omit cents) (d)					
1	Land and land improvements and	(0)	(c)	(0)					
•	buildings								
2	Tower and antenna system								
3	Transmitter equipment								
4	All other property								
5	Total, all property (lines 1-4)								
<u></u>		(4)(4))	(49-86)	157 841					
Per	son in charge of correspondence regarding t	his report:							
	(Name)		(Official Title)						
		(Ollice Address)							
	C	ERTIFICATION							
(This report must be certified by licensee or permittee, if an individual, by partner of licensee or permittee, if a partnership, by an officer of licensee or permittee, if a corporation or association, or by attorney of incensee or permittee in case of physical disability of licensee or permittee or his absence from the Continental United States.) I certify that to the best of my knowledge, information, and belief, all statements contained in this report are true and									
	ect,*	Title		***************					
	a Code Telephone No								
* A1	ny person who willfully makes false statements itle 18, Section 1001.	on this form can be p	inished by fine or impriso	nment. L. S. Gode.					

٠4.

BARCO AND BARCO, Meadville, Pa., November 12, 1975.

Hon. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: We have received your letter of November 4, 1975, with enclosures; and we very much appreciate your courtesy in affording us the opportunity to review and respond to the TelePrompter proposal concern-

ing the cable issue in H.R. 2223.

Initially, we must emphasize that when I appeared before the Committee, I spoke on behalf of, and presented the *Position on Copyright* of, Pennsylvania Cable Television Association. The *Position* was developed over the past seven years with the active participation of the Board of Directors and Officers during a number of meetings, and finally presented to the membership which approved and adopted it. As soon as I received your letter, I attempted to arrange for a special meeting of the Officers and Board of the Pennsylvania Association (which number 25) to consider the TelePrompter proposal; but a meeting could not be arranged until next week. Because this will be after the November 14, 1975, date given in your letter for response, I have determined to comment briefly on the matter, in view of my long involvement with the issue as a cable television operator, as attorney for the Pennsylvania Association, and as a member of the NCTA Copyright Committee.

In my view, the TelePrompter proposal is not based on a sound or correct concept of the nature of cable television service; would operate inequitably and be prohibitive in many fringe area situations; and would be complicated and un-

certain in practical application.

The basic error in the concept of the TelePrompter proposal is that it ignores that cable television service is on the reception side of the line, for the proposal attempts to relate cable operations to broadcasting operations which is totally inappropriate because the operations are essentially opposite. Thus, applying the total cost of programing (of which copyright is just a part) or a 28 per cent figure is wholly unrealistic and in no way related to any measure of responsibility

for copyright payment.

The proposition that cable operators are to make payment for program costs has never been considered before; no demand has ever been made for any such payment; and there is simply no basis or justification for these added costs to be imposed on subscribers for the benefit of copyright owners. Again, the second percentage factor of "popularity of non-network programming" is not only indefinite, but fails to take into account at all that subscribers participate in supporting all costs, including copyright, through their purchase of advertised products.

Further, the definition of a "copyright qualifying broadcast station" is unrealistic and too restrictive by imposing on catv service an artificial television marketing pattern based on predicted contours which has no relationship to television reception conditions in fringe areas where most catv systems are operating, including in Pennsylvania. We believe that if a television broadcasting signal can be received off-the-air—either by a rooftop antenna or by catv antenna—there should be no payment of copyright, irrespective of whether a station is a "must corry" one under the present rules of the Federal Communications Commission or as the FCC may require in the future.

We recognize that the TelePrompter proposal has the desirable aspect of eliminating the copyright tribunal with its constitutional and other legal weaknesses, as well as the hazard and uncertainty to which the tribunal provision subjects the industry. We have always strongly urged that the rates for any copyright liability must be statutorily set forth (in keeping with the legislative function) and cannot properly be left to a tribunal (which functions primarily in a judicial manner). However, we believe that the TelePrompter proposal has other

fundamental weaknesses of its own.

We also appreciate the recognition in the TelePrompter proposal that certain television reception should be exempt from copyright payment. However, we believe the rationale for the definition of the exempt reception includes certain premises which may apply to broadcasting, but have no application whatever to catv. In point of fact, it is not clear that the TelePrompter proposal solves any of the real concerns for catv on the copyright issue, either in terms of the amount or the incidence of copyright payment; furthermore, it introduces new problems, uncertainties and inequities.

To the extent that the TelePrompter proposal recognizes that certain television receiption service should be exempt from copyright payment, we believe it supports the general concept of the Pennsylvania Position. The exempt television reception service under the Pennsylvania Position includes reception of television signals received off-the-air and basic television reception (by whatever means secured), because the broadcasters and copyright owners make use of the public airwaves without payment. Under the Pennsylvania Position, microwaved signals beyond those required for basic television reception are to be subject to copyright at a statutorily determined rate. While there is room for a difference of opinion as to the rate of payment for microwaved signals, the Pennsylvania Position continues to remain the only one that is not only sound in concept but workable and equitable in application.

workable and equitable in application.

We propose to have the TelePrompter proposal reviewed at the forthcoming meeting of the Board of Directors of the Pennsylvania Association on November 19, 1975, and will inform you of the results of their consideration for such

assistance as it may be to you and the Committee on this issue.

Very truly yours,

George J. Barco, General Counsel.

RICHARD L. BROWN, Washington, D.C., November 19, 1975.

Re: CATA's comments on the Teleprompter proposal.

Hon. ROBERT E. KASTENMEIER,

Chairman, House Subcommittee on Courts, Civil Liberties and the Administration of Justice, Washington, D.C.

DEAR MR. CHAIRMAN: You have requested our comments concerning the Teleprompter (TPT) compromise proposal regarding CATV liability under pending H.R. 2223; we are pleased to make this preliminary response and respectfully request that it be included in the record.

CATA'S POSITION

Because of a delay in receipt of your request, the Committee's Counsel has gratiously extended our time for response. We have thus had the unilateral benefit of seeing the comments of some of the other parties. While in a judicial proceeding an element of unfairness might attach to such a result, we believe that our comments are, as a result, more directly keyed to areas of controversy concerning the TPT plan and are thus beneficial to the legislative process. In the interest of fairness, a copy of this letter has been sent to each of the parties whose comments we have seen.

CATA is one of the two national trade associations representing the CATV industry. It commenced in the summer of 1973, primarily because of disaffection with the position taken by the National Cable Television Association (NCTA), concerning the issue of copyright payments by the CATV industry. CATA now engages in a broad range of activities and as a result CATA's membership has increased in just two years from a mere handful to over 435 systems (approximately 600, if counted in accordance with the FCC's definition of CATV). Because CATA's by-laws do not require that an individual or business entity place all CATV systems owned into the membership, the preceding numbers are not fully representative of CATA's membership. CATA estimates, on a conservative count, that between 750-800 CATV system's views are actually represented by its membership roster. This represents, on a system count basis, the views of nearly fifty percent of CATV systems belonging to national trade associations. The above statistics are provided to aid the Congress in evaluating these comments, and assessing support of the TPT plan. In this regard, while CATV members range in nature from independent to multiple ownership and in size from 14 subscribers to over 12,000 subscribers, the average size of member's systems is now at 826 subscribers.

As you know, CATA, the Community Antenna Television Association, has staunchly defended, in these procedings, what the Supreme Court has held: that CATV does not owe copyright. The Supreme Court's recognition that the 1909 Act did not cover CATV and that new copyright legislation was pending in the Congress, was not an invitation to invoke the proposition that the 1909 Act was defective and that CATV should pay. To the contrary, the Court has, on all

occasions it has considered the question, recognized that CATV transmission was not a performance for profit. That is, CATV activity falls on the viewers' side of the line, irrespective of whether the signals transmitted were local or distant. For this and other reasons presented in our testimony, CATA believes that imposition of copyright liability on CATV is an inappropriate application of the copyright delegation of power in the Constitution and is likewise at odds with the goals of the Communications Act of 1934 to secure the general benefits of television programming to all the people of the United States and to encourage its larger and more effective use in the public interest. With the FCC preparing a bill for courtesy introduction concerning its authority over CATV, with the White House Domestic Council on deregulation similarly preparing proposed legislation concerning CATV, and with the various Commerce Committees also apparently considering CATV legislation, there is, at this juncture, an intermixture of copyright and communications policy that cannot be avoided. Given the actual state of the cable television industry, as opposed to the hypothetical projections tendered by the Motion Picture Association of America (MPAA), imposition of copyright would virtually kill off any chance of wiring certain areas of the United States, including rural America, where both Congressional policy and FCC policy have failed to bring television to American citizens. We will return to this matter below.

While Teleprompter, itself, has not deviated from its support of the principal that CATV does not owe copyright, it has offered a compromise proposal in light of its fears that the "no copyright" position favored by Teleprompter, CATA, the Pennsylvania Association and others, does not prevail. CATA thus responds in a similar vein. That is, our comments should be viewed as directed towards the end of perfecting legislation that, in its current form, may be unconstitutional (there is apparently a significant question here as reflected in the TPT and MPAA memoranda) and is certainly cumbersome and unpredictable in its application. Our comments, therefore, are not an endorsement that CATV owes copyright. CATA believes, however, that the Teleprompter proposal is sound in logic and easy of application, thus overcoming the defects of present H.R. 2223. Fine tuning of the TPT plan would meet with a favorable response from CATA.

THE TELEPROMPTER PLAN

CATA understands the Teleprompter plan as follows: CATV would pay copyright for distant signals only. Payment would be based on the popularity of the signal carried in the distant (CATV) market, multiplied by a percentage of CATV subscriber revenue for reception service that would hypothetically be available for copyright payment. The popularity factor is the market share of an independent station or the market share of a network station when not broadcasting network fare; i.e., when broadcasting non-network or "independent" programming. Market shares would be determined by comparing total viewing hours of the stations or programs in question with total viewing hours in the county of the CATV system.

REVENUES AVAILABLE FOR COPYRIGHT

Teleprompter proposes that the popularity of the distant signal in the cable community be multiplied by a theoretical factor of CATV's ability to pay copyright. In the interest of compromise, Teleprompter suggests that the factor be the same percentage number that all television stations pay for programming costs of their total revenue in each year (which was 28% in 1974). In making this proposal, Teleprompter suggested that the factor was "generous" in the sense that the capital costs of the cable industry are much greater than those of broadcasters and that no consideration is made of the fact that broadcasters use a publicly owned scarcity, spectrum space, for free. CATA believes that Teleprompter's proposal, in this regard, is more than generous; it is philanthropic.

The 28% figure (or whatever it might be in a future year), does not reflect a measure of "copyright costs" for broadcasters, at least as such costs bear on the broadcaster-program supplier-CATV interface. The factor employed by Teleprompter is derived from FCC Form 324, which requires broadcasters to report financial information concerning television station operation. On Form 324, program expenses are broken down into several categories including such matters as: (1) payroll for employees considered talent, (2) payroll for all other program employees, (3) records and transcriptions, (4) cost of outside news service, (5) music license fees, etc. Many of these classifications are inappropriate to the

question at hand. Testimony in this proceeding has focused principally on the extent that a program supplier is deprived of an opportunity to sell his program fare in a market where it has been "previewed" through CATV carriage. Thus, only the program cost to broadcasters for the purchase of syndicated materials should be considered. "Syndicated" here is used to encompass all forms of nonnetwork materials, which is the product CATV allegedly impacts through its ability to present programming in a distant market before the syndicator has a chance to make a sale in that market. Costs of producing local programming, e.g., local news, play no part in the consideration at hand, because these are not products that are syndicated in distant markets by the program suppliers.

While CATA recognizes the use of the cost of programming to broadcasters is not analogous with CATV transmission concepts, we believe that if the TPT proposal included only those costs associated with purchase of programming from syndicators, an acceptable compromise would emerge for the multiplication factor involved in Teleprompter formula. We make this determination based largely on the fact of a readily accessible multiplication factor computed by the FCC yearly and based also on the fact that TPT has caused to surface the only

concept thus far related to known programming costs.

Finally, the rate base, extrinsically defined, rids H.R. 2223 of perhaps its most obnoxious clause—the ability of a royalty tribunal to set rates and to define the rate base. As tenuous as is the claim of program suppliers to be dipping into CATV pocketbooks, the claim of MPAA that the program suppliers should be able to receive their copyright tax from other CATV services (pay TV revenues, burglar alarm service, etc.) is double dipping in the worst possible connotation. MPAA advocates nothing more than that CATV be a rate-regulated industry. This is expressly contrary to the position of the FCC that CATV is not a utility, is not a common carrier, and that it should not be a rate regulated industry in the vein that such other industries are.

The MPAA stated prospect that CATV can, in effect, cheat the program supplier by reducing basic subscriber rates and increasing pay TV rates is absurd. Because CATV pays 30-50% of every dollar of pay TV revenue to the program supplier, its completely illogical that CATV would "cheat" itself from a 1-5%

rate to a 30-50% rate.

PROGRAMING COVERED BY THE PROPOSAL

The premise of the Teleprompter proposal is that no CATV liability would attach for the retransmission of local signals or for network programming. This premise is sound because program suppliers cannot lose money (sale opportunities) by local transmissions; and network programming is meant for one time distribution to the entire nation and is thus compensated. We believe that there are serious omissions in the TPT plan that, if included, would be consistent with the TPT rationale, and would contribute to the making of a more reasonable piece of legislation. First, programming viewed on cable television systems located beyond the service area (Grade B contour) of any television stations should be exempt. There is no logic behind charging systems located outside the service area of any broadcast stations because program suppliers risk no exposure of watering down their potential licensing markets in areas outside of those markets. Thus, the MPAA dilution of marketplace argument does not cxist when applied to the small groups of CATVs located beyond all television markets (approximately 250 CATV systems).

The next level of concern is with respect to other systems located in predominantly rural areas. These give rise to a concern referred to earlier involving the tension between Communications Act purposes and copyright purposes. Mainly, we are talking about television service in the rural areas of the United States. The Office of Telecommunications Policy has conducted a study, "Television Distribution in Rural Areas", February 1975, in which it found that over one million households in the United States (approximately one and a half percent of all households) receive no adequate television service at all because they are located beyond the Grade B contour of any television station. According to the OTP study, nearly six million households (approximately 9% of the U.S. households) receive fewer than three channels of TV and approximately twenty two million households receive service of fewer than five channels of TV. Although many of these towns have been CATV-built, there is a ready market for small system construction; i.e., systems serving between 100 and 1,000 subscribers. The hard question concerns these television disenfranchised Americans.

Imposition of copyright places a burden of such magnitude that cable construction in these areas would be unlikely under the present H.R. 2223 proposal. In this regard, it is instructive to turn to the consensus agreement, not to rely on it, but to see how we arrived here. The FCC adoption of the Cable Television Report and Order, 36 FCC 2d 143 (1972), pursuant to the consensus agreement, was supposed to be the lifting of the FCC imposed freeze on CATV growth. It did not work. CATA research reveals that 525 new systems have been activated since the "lifting" of the freeze. Unfortunately, 1972 was not an ice-breaking year at all: one finds significantly greater new CATV construction during the freeze (841 new systems started in the period 1968–1972). In further sampling, CATA found that internal growth patterns of CATV systems in the last year were as follows:

System size	Subscriber growth past 12 mo (percent)	Average cable plant growth, 12 mo (miles)
50 to 250	. 6.03 . 7.8 8.03	0. 1 2. 5 2. 96 3. 38 4. 97

CATA's study further indicates that new systems begun in the twelve month period, August 1974 through August 1975, amounted to 68 systems with only 2% new systems with growth in the most recent twelve month period.

This sampling enabled CATA to prepare a study of the number of new CATA plant miles added nationwide, by all systems, during the most recent year. We find them to be approximately as follows:

	National total
System. size:	new plant-Miles
50 to 250	59
251 to 1,000	3, 217
1,001 to 3,500	2,540
3,501 to 10,000	
10,001 and up	

Thus, just under 8,000 miles of new plant was generated by the industry in the most recent year (not inclusive of the new miles added to the industry by 68 new system starts). Extrapolating to a national total of 130,100 miles of CATV plant (inclusive of new starts in 1974-1975), we find that the internal growth amounted to no more than 6.1%. CATV is a significantly depressed industry. We believe that in the small, unbuilt rural communities that budget versus income structure of the small CATV system constructed to serve a small town is so tight that the administrative costs for meeting the reporting and record-keeping functions effectively double the copyright taxation to be extracted. To set up with competent legal and accounting help, to just file the quarterly report, etc., would make the difference between profit and loss when added to the copyright tax, thus foreclosing new construction in rural areas. Previously, CATA conducted a study concerning small system operation for consideration by Senator McClellan to which we referred to in our testimony, and which reveals the low profit status of rural CATV and that the claim made here is without exaggeration. That study is attached hereto as Exhibit A.

While the MPAA would have you believe that communications policy and Copyright policy have always been separate and apart, such is not the case.

CATA, as the trade association interface with that part of the CATV industry that is presently represented largely by independent operations, many of them located in rural areas, believe that the following suggestions, if incorporated into the bill would remove the communications/copyright interplay of H.R. 2223. There are several solutions, for example:

(1) The Pennsylvania position—no copyright payments for signals received off the air or necessary to make up an available complement of three networks, three independents and one educational station.

(2) A complete exemption for CATV systems located beyond the television markets as defined by the FCC (35-mile zones). This is, in effect, a shrinking

of the "natural" Grade B market to a zone of 35 miles, the FCC having determined in its 1972 rules that there is no adverse impact to television broadcasting (or to copyright holders) outside of the 35-mile zone.

(3) An exemption from copyright for classes or systems of a certain size (or as proposed by the NCTA a dollar exemption of \$100,000). The latter is a spin-off from the consensus agreement, which excluded from copyright liability, carriage of signals by independently owned CATV systems in existence at the time of the consensus agreement that had fewer than 3500 subscribers.

CATA believes that some modification and combination of all of these ideas

is in the spirit of compromise.

CATA proposes that over and above the TPT plan, systems located outside 35-mile zones of television stations also be exempt from copyright for any signals that are picked off the air. This overcomes theoretical questions of whether these are deemed local or distant by manging FCC rules. (The local/distant distinction really plays no part in areas outside of 35-mile zones because the FCC has determined that such meass are in effect a programming free-for-all, i.e., cable systems may carry whatever signals they choose because the carriage does not influence broadcast revenues). What we are striving for is a true concept of localism that does away with arbitrary definitions. If an independent signal (or non-network programs) was imported by microwave, copyright liability would attach. CATA recognizes this as a cutback from the Pennsylvania position in that, in many cases, signals receivable off the air would not provide the full compliment of signals that the Pennsylvania Association believes should be free from copyright; but combined with a small system exemption, it would be a fair treatment of the issue.

CATA endorses the NCTA \$100,000 exemption, i.e., a system with less than \$100,000 in gross revenues from subscriber fees would be excluded from copyright liability. This exemption would clear the way for small system construction, irrespective of the location of the system. Most importantly, it would alleviate the disproportionate burden that the TPT proposal would otherwise place on rural and small CATVs, as demonstrated in the studies conducted by the MPAA.

EASE OF APPLICATION

One of the 'enefits of the TPT proposal is that it is easy to apply and would eliminate the need for a royalty tribunal—a tribunal whose existence portends continued litigation for small systems to say nothing of the constitutional infirmities involved. Rating services currently conduct county-wide viewing studies which are available to and have been employed by the FCC in its various research departments. The spectre painted by MPAA of FCC involvement at great burden to the public is simply nonsense.

TERMS OF ART-"LOCAL" "DISTANT" "REQUIRED CARRIAGE"

It does not appear that MPAA either fully understands the TPT plan or is deliberately attempting to obfuscate it with respect to the FCC's signal carriage rules. The modifications suggested above by CATA in the TPT proposal would work as follows:

(1) CATVs beyond the Service Areas (Grade B contours) of all television

stations are exempt.

(2) CATVs beyond the 35-mile zones (FCC market definition) of all television stations are exempt with respect to any signals picked off the air or which the FCC requires the CATV to carry. It should be noted that the FCC requires carriage of local signals only upon request of the broadcaster. Mandatory carriage is, the efore, protection for the local broadcaster (and his program suppliers) insuring that all CATV homes in the local market will have the ability to view the program/product.

to view the program/product.
(3) CATVs within 35-mile zones of television stations pay copyright for any signals not required to be carried by the FCC, i.e., truly distant signals irrespec-

tive of whether such signals are obtained by microwave or not.

(4). There is an exemption for systems, no matter where located, for the first \$100.000 of revenues.

THE SPIRIT OF COMPROMISE

The premise in which CATA submits these comments is not in any belief that CATV owes copyright. Neither does Teleprompter. Nor do we believe that any but a very few CATV operators really believe that they owe copyright. Whatever support is left for H.R. 2223 is grounded in the 1972 consensus agreement. We do intend to rehash, here, the low regard that the consensus agreement deserves. We did not participate in it and are not bound by it. As such, we find it difficult, if not impossible, to compromise our "no copyright" position.

We find it particularly difficult to do so when the MPAA has proved our case. MPAA submits page after page of "testimony" proving that CATV carriage plays no part in the bargaining process between program suppliers and television broadcasters. Why then should CATV pay copyright? Even giving the most favorable light to MPAA's "testimony", it is evident that the program supply business is one of the few pure marketplaces left in this country:

(1) The primary factor in syndication pricing is supply and demand. When there are more stations in the market, there will be more bidders for the program, and accordingly, the price will be higher.-Erwin Ezzes,

Chairman, United Artists TV.

(2) ... since many programs compete for sale to such limited ortlets and there is always more product than time available for syndicated programs, there exists a perpetual and structural "buyers" market that is not and cannot be affected by increases in coverage due to CATV-Frank Reel,

President, Metromedia Producers Corporation.

On the one hand, MPAA experts tell us that the number of bidders (TV stations) bidding for limited amounts of product determines price; i.e., ple supply and demand. They also tell us that there is so much product for sale, that CATV coverage does not enter the picture. What can be concluded: that price is the only consideration in the bargaining process. Discussion of price, "horse-trading", if you will, is an all inclusive factor. Everything must be taken into consideration, sub silentio, when buying the product. Example:

The horse trader brings a horse that he paid \$500.00 for to a horse auction. In setting his price, he determines, the number of horses being sold, the quality of horses being sold, the "horse-trading" ability of the other owners, the delivery charges, whether it would be better to sell the horse at a different sale where there is less product available, etc. He puts up a sign: "Good Horse \$600.00" A buyer sees several similar horses from \$500.00 to \$570.00.

Conversation:

"I'll give you \$500.00 for the horse."

"It will cost you \$600.00."

"There are several like it for \$570.00 and less."

"I'll sell it to you for \$560.00." "\$550.00 and you have a deal."

"Okay, it's a deal."

While several factors played a part in both the buyer's and seller's decision, the only matter discussed was price. That is why the Supreme Court has thrice held that the program supplier has it within his power, in the bargaining process, to include the benefits of distant signal carriage. Whether he does so cannot be ascertained from pure price negotiations. Because the broadcaster seeks to have his signal carried in distant markets, includes additional CATV coverage in his promotional efforts (as demonstrated by TPT's previous testimony), we must assume this is done for a purpose-to obtain additional dollars from advertisers. Neither advertisers nor program suppliers will publicly admit to paying for CATV coverage simply because they will not discuss the matter, simply because it is against their financial interests to do so. The Supreme Court's sophistication in dealing with this concept is evidenced in Fortnightly, Tele-prompter and Aiken. For those reasons, CATA cannot deviate from a "no copyright" commitment. We do recommend to the Congress the TPT plan, as modified herein, as a sound piece of alternative legislation.

Most respectfully submitted,

COMMUNITY ANTENNA TELEVISION ASSOCIATION, RICHARD L. BROWN, General Counsel.

EXHIBIT A-STUDY OF OPERATING COMMUNITY ANTENNA TELEVISION SYSTEMS

The COMMUNITY ANTENNA TELEVISION ASSOCIATION (1) was requested by the Honorable Senator John L. McClellan, Chairman, U.S. Senate Committee on the Judiciary, Subcommittee on Patents, Trade-Marks and Copyrights to prepare a survey and study of the actual operating expenses and net income of the nation's CATV systems.

This study was begun in mid-November. It was conducted in the following

(1) 1,000 Community Antenna Television Systems selected: From the files of CATA, 1,000 operating CATV systems were chosen to receive a questionnaire/ survey form. These systems were chosen in the following manner:

(A) Only systems NOT owned by any of the top 25 MSO (multiple system operators) groups were selected. This resulted in a maximum direction of the

survey forms to small and medium sized, independent CATV systems.

(B) Systems were spread geographically so that a fair representation of survey

forms went to systems within every state in the Union.

(2) What was asked of CATV operators: Operators receiving the forms were asked to go into their own accounting records and complete the detailed survey form breaking down the actual expenses and receipts for the last complete fiscal (calendar) year. Operators were promised that the highly confidential material they were disclosing would not be divulged or utilized outside of the CATA office and the Senate Subcommittee on Patents, Trade-Marks and Copyrights.

(3) Who responded: By the December 1 cut-off-date, 191 survey forms were

returned to CATA; representing 19.1 percent of those survey forms mailed out. These initial 191 survey forms were utilized in this study. The original survey forms are being turned in to Senator McClellan with this study. Additionally; approximately 60 late-arriving forms not included in this tabulation are also

being turned in.

(4) How the survey forms were tabulated: Listed in the survey forms were 21 categories of expenses which the typical Community Antenna Television System accumulates in normal operation. From the 191 survey forms turned in by December 10, 1973, CATA tabulated the dollar total within each category. CATA also tabulated the number of subscribers represented by the expenditures within each category, and divided the dollar total by the subscriber total to arrive at the average expenditure per subscriber within each category.

When all 21 categories had been so tabulated, the total of the 21 individual expense categories was computed to arrive at the average overall expenditure per

subscriber for the year 1972.

This resulted in a known expense average for each subscriber in each system in

the study. The 191 systems had a total of 162,336 subscribers.

The survey forms also provided the gross receipts per system. These gross receipts for all 191 systems were added together and divided by the total subscribers represented by these systems; to arrive at the average gross receipts per subscriber for all systems studied.

(5) Refinements of the basic tabulations: Within the master study of 191 systems reporting, several sub-studies were completed. These included:

(A) A separate study of expenses and gross receipts and net profits for 42 microwave-served CATV systems;

(B) Separate studies for systems in the following size categories; 40-500 subscribers; 501-1,000 subscribers; 1,001-1,500 subscribers; 1,501-2,000 subscribers, and, 2,001-5,800 subscribers.

This group of sub-studies concentrated on the impact of the flat 1% (proposed) copyright fee for systems in these size groupings; to determine the ability of

systems of various sizes to absorb the proposed copyright fee schedule.

(6) Substantiation of survey summaries: All of the survey-study forms received back from Community Antenna Operators, by CATV, are being turned in with this master synopsis, to Senator John L. McClellan. C. TA is also turning in its original work sheets which it utilized to tabulate the totals from these study and survey sheets. Verification of any of the synopsis tabulations is therefore possible by simply checking the CATA work sheets against the individual survey sheets, and re-adding/re-subtracting of the appropriate number columns.

CATA-COMMUNITY ANTENNA TELEVISION ASSOCIATION MC CLELLAN COPYRIGHT STUDY WORK FORM

	Number of systems	Total amount	Lowest	Lowest Highest	Number of sub-	Per sub-		
Expense category	reporting	for all		amount	scriber total	scriber - average	Low	High
Microwave	179. 0	\$401, 117.00 1, 796, 194.00 922, 313.00	\$2,383 300 340	\$48,600 26,400 29,387	49, 149 157, 896 122, 728	\$8.16 11.38 8.09	235 40 61	2, 781 5, 800 5, 800
installer 5. Secretary 6. Office rent 7. Head end rent 8. Electricity 9. Insurance/taxes A. Franchise fees	150. 0 168. 0 148. 0 186. 0 185. 0 124. 0	738, 555. 00 625, 332. 00 205, 653. 00 93, 990. 00 239, 931. 00 628, 566. 00 178, 203. 00	36 276 50 10 60 40	75, 600 16, 212 6, 600 3, 060 5, 438 26, 395 10, 945	97, 251 142, 503 156, 007 136, 206 158, 904 160, 379 121, 763	7.60 4.39 1.32 .69 1.51 3.92 1.46	45 61 40 40 40 40 101	5, 800 5, 800 5, 800 5, 800 5, 800 5, 800 5, 800
B. Pole rental. C. Vehicle operations expenses. D. Subscriptions and dues. E. Legal/accounting. F. System repairs. G. Teleco/telegram. H. Travel expenses. J. Billing/collections.	176. 0 160. 0 174. 0 185. 0 154. 0 139. 0 172. 0	392, 220. 00 396, 367. 00 61, 787. 00 274, 554. 00 659, 594. 00 99, 842. 00 87, 860. 00 119, 490. 00 131, 648. 00	102 92 27 21 100 12 13 18 12	15, 925 7, 682 2, 826 27, 906 37, 724 4, 200 6, 313 5, 534 7, 844	145, 899 156, 510 147, 637 158, 349 160, 398 145, 409 139, 740 150, 915 117, 656	2.69 2.53 .42 1.73 4.11 .69 .79 1.12	40 40 61 40 61 90 45 40	5, 800 5, 800 5, 800 5, 800 5, 800 5, 800 5, 800 5, 800
K. Advertising	151.0 155.1	10, 414, 877. 00 9, 166, 052. 00 3 7. 34	4	13, 164	141, 303 2 162, 336	.74	61	5, 800

¹ Less microwave.

MODEL SYSTEM—NO. 1 (A SYSTEM WITH MICROWAVE SERVICE FOR ONE OR MORE CHANNELS)

(A) Total systems studied in report, 191.

(B) Total systems with microwave, 42 (21.98%).

(C) Total system customers with microwave, 49,149 (30.27% of total customers studied).

(D) Model microwave system has 1,170 subscribers and is typically 7 to 8 years old.

Dollars spent

(E) Expense category:

per sub. per year (1) Microwave _____ \$8.16 System manager______11.38 (3) System technician(s) 8.09 (4) System installer(s) 7,60 (5) Secretary(ies) _____ 4.39 (6) Office rent______ 1.32 (7)Head end rent 0.69 (8) Electricity _____(9) Insurance and taxes_____ 1,51 3.92(10) Franchise fee payment(s) 1.46 (11) Pole rental_____ 2.69 (12) Vehicle operating expense(s) 2.53 (13) Subscriptions and dues 0.42 Legal and accounting (14)1.73 (15) Repairs to system_____ 4.11 (16) Telephone service..... 0.69 0.63 (17) Travel expenses..... (18) Office supplies_____ 0.79 (19)Billing and collections_____ 1.12 (20)Advertising _____ 0.74 (21) Miscellaneous 1.00

² All systems total.
3 Per subscriber.
5 Before retirement of debt principal, interest, and capital expenditures.

Average subscriber gross, \$72.70 per year. (1) for 1,170 subscribers in model system	$ \begin{array}{r} -7.73 \\ 9,044.10 \\ -850.59 \\ \hline -8,193.51 \end{array} $
Model System—No. 2 (A System With or Without Microwave	SERVICE)
 (A) Total systems studied in report, 191. (B) Total systems studied for this model system, 191 (100%). (C) Model system has 850 subscribers and is typically 6-7 years of (D) Expenses category: 	ds.
Dollars spent per subscriber per year	
(1) System manager (2) System technician(s) (3) System installer(s) (4) Secretary(ies) (5) Office rent (6) Head end rent (7) Electricity (8) Insurance and taxes (9) Franchise fee payments (10) Pole rental (11) Vehicle operating expenses (12) Subscriptions and dues (13) Legal and accounting (14) Repairs to system (15) Telephone service (16) Travel expenses (17) Office supplies (18) Billing and collections (19) Advertising (20) Miscellaneous	8. 09 7. 60 4. 39 1. 32 0. 69 1. 51 3. 92 2. 53 0. 42 1. 73 4. 11 0. 69 0. 63 0. 79 1. 12 0. 74
Total expenses per subscriber	\$56.81
Average Subscriber Gross, \$64.15 per year. (1) for 850 Subscribers in model system	6, 239, 00 545, 27 5, 593, 73

SAMPLE SYSTEMS STUDY

To determine what changes, if any, occur in the net-profit category, as a function of system size (i.e. number of subscribers and gross revenues), a sampling of the total of 191 systems was performed.

Systems were broken down into several easy-to-handle categories, and a representative sample within each sub-group category taken. Gross proceeds within the category, net expenses, net profit (1) and net profit-per-subscriber were measured. They follow:

System size	Number of systems sampled	Gross receipts	Net expenses ¹	Profit/ (loss)	Net per sub
40 to 500 subs.	18 (9. 4)	\$298, 470	\$336, 697	(\$38, 227)	(\$7.62)
501 to 1,000 subs.	18 (9. 4)	839, 619	755, 934	83, 685	5.97
1,001 to 1,500 subs.	13 (6. 8)	1, 003, 707	931, 658	72, 049	4.36
1,501 to 2,000 subs.	11 (5. 7)	1, 098, 344	942, 138	156, 206	8.54
2,000 to 5,800 subs.	16 (5. 2)	1, 559, 034	1, 222, 460	320, 984	12.32

¹ Met expenses. Includes direct operating expenses and does not include (A) principal (debt) retirement, pa, ment of interest on any outstanding principal debt, (C) capital expenditures for new expansion, additions.

It is readily apparent from the above that system size has a very direct bearing on cash flow generated by the system. It should also be noted that the $Nct\ Pcr\ Sub$ (scriber) column (far right) does not represent profit; that out of this remaining cash flow after expenses the system must retire its debt (both principal and interest) and make capital expansions to increase the system's reach in an ever growing community.

Copyright 1% fee-How It Changes Sample Systems Profit or (loss)

The previous page detailed a study of sample systems by system size. The far right hand column showed the net profit (or loss) per subscriber within each system-size category as income was reported for the calendar year 1972.

We will now compare these figures with the added burden of a 1% copyright fee.

System size	Within sample- average size (subs)	Profit/(loss) (per sub)	1 percent copyright fee (per sub)	Net after copyrigh t
40 to 500 subs	278. 55 778. 40 1, 270. 15 1, 661. 91	(\$7.62) 5.97 4.36 8.54	\$0.59 .60 .60	(\$8.21) 5.37 3.76 7.94

In each case, the 1% of gross revenues copyright fee proposed has a much larger impact on the NET income (after operating expenses but *before* debt retirement and capital expansions) than the 1% would imply. This impact, as measured in this study, is as follows:

System size	Net before copyright per subscriber	Net after copyright per subscriber	Percentage reduction in net revenues
40 to 500	(\$7.62)	(\$8.21)	¹ 7.7
	5.97	5.37	² 11.1
	4.36	3.76	² 13.8
	8.54	7.94	² 7.1

Increase in net loss.

Note: Systems of over 2,000 subscribers in our study had an average return of \$12.92 per subscriber before copyright and \$12.32 per subscriber after copyright, a 4.7 percent reduction in net revenues because of the 1 percent copyright liability. The largest system so studied had 5,800 subscribers.

SYNOPSIS

CATA was requested to prepare this study so that the subcommittee on Patents, Trade-Marks and Copyrights might have factual, current data on the true financial picture of the small, independent Community Antenna System Operator.

To the best of our knowledge, this type of hard, factual data has never before

To the best of our knowledge, this type of hard, factual data has never before been gathered into one concise study by the CATV industry. To a very large measure, the results of this study have depended almost entirely upon the open willingness of the small, independent operator to provide this "raw data." In effect, CATA asked 1,000 system operators to divulge their own, confidential financial information. And to divulge it not only to CATA, but to a group that was proposing to "tax" part of their gross receipts!

CATA is providing not only this synopsis study of this survey, but the raw survey forms as completed and turned in by the Community Antenna System operators. CATA believes its synopsis tabulations to be correct, but invites re-

tabulation by the Subcommittee.

The study clearly shows that small CATV systems are performing a service far greater than had previously been imagined. The synopsis shows that the typical system with fewer than 500 subscribers is actually losing money (\$7.62) in its annual operations each year. We don't suggest that (A) the study is incorrect, or, that (B) this is not true. We do know, however, that when a man builds a very small system to serve typically fewer homes than 500 cable homes, he takes upon his own shoulders those responsibilities of the system manager,

² Reduction.

the system technician, the system installer and often the system secretary. all rolled into one person. This reduces the out of pocket expenditure but makes

for very-very long days for the typical small operator.

And if there is a case to be made for relief from the proposed copyright fee schedule for the so-called independent, small operator, it should be with the understanding that the small operator does not hire the vast majority of his work done for him; he does it himself. And that as a full time resident of his community, he is "Mr. Television" to his community; a man devoted to the bringing of quality television signals to his isolated community he lives in and serves.

And that if . . . and that is a big if . . . he is able to make any rate of return on his investment, it is solely because he is providing, has provided, and will continue to provide a fair service for a fair rate. And because he is not afraid, or unwilling, to perform that service 18 hours per day, 365 per year.

The study completed here indicates that there is ample reason for an exemption for Community Antenna Television System operators with fewer than 3,500 subscribers. The net rate of return per subscriber, as detailed herein, and before any repayment of indebtedness principal, interest or additional capital expansions, is such that systems with fewer than 3,500 subscribers are typically just treading water.

And directly contrary to the off-repeated view that "small CATV systems are goldmines" (a few undoubtedly are . . . but the average one is not, as this study plainly shows), the small, independent CATV systems need all of the

relief that they can get.

CATA respectfully urges the Subcommittee on Patents, Trade-Marks and Copyrights to carefully consider this study in making any final determination for copyright liabilities for CATV systems; and suggests that if systems with fewer than 3,500 subscribers could be re-classified as Community Antenna Systems and be therefore exempted from a copyright fee schedule, that such be done.

> OBS, INC., New York, N.Y., November 19, 1975.

Hon. Robert W. Kastenmeier,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of
Justice, Congress of the United States, Committee on the Judiciary, House of Representatives, Washington, D.C.

Dear Mr. Kastenmeier: In your letter of November 4 you invite me to give the Subcommittee my views on the proposal by Teleprompter Corporation to amend Section 111 of H.R. 2223.

At the outset let me note that this action by Teleprompter appears designed either to forestall copyright law revision entirely—thus preserving in the cable television field the present state of copyright anarchy from which only cable television benefits—or to eliminate entirely the possibility that under the revised law copyricht payments by cable television for its compulsory license would ever reach a reasonable level. To appreciate the thrust of Teleprompter's proposal, it is necessary to understand the basic unfairness-vis-a-vis broadcastingwhich lies at the heart of cable television's operation. That unfairness works in the following way.

In any given community the local cable system and the local television broadcast station are natural competitors against one another for audience. But under the present copyright law the only competition between them is unfair competition. To attract audience both offer the program schedule of the television station. The television station is subject to the normal operation of the copyright law and must secure permission to use the programs. The cable system neither

secures permission nor does it pay. The cable television system also attracts paying subscribers with the programs contained in the signals of any other local broadcast television stations; the cable system pays nothing for them.

It imports distant broadcast signals; it pays nothing for the programs contained in them.

The cable television system also attracts paying subscribers with the programs more frequently making a special charge (generally on a per-channel basis) to 1. subscribers for those programs. When it originates, it also has a unique advantage—even though under the present copyright structure the cable system has to secure permission and make a negotiated payment. The unique advantage derives from the fact that if it is successful under the present copyright structure in negotiating against the local station for a program, it alone acquires the right to utilize that program. The local station does not get a free ride. On the other hand, if the local station is successful in the competition to acquire the program, the cable system which lost in the competition can carry the program as it is contained in the broadcast signal. The cable system gets a free ride.

It is in the economic interest of the cable system to enhance the attractiveness to its subscribers, and to its potential subscribers, of what it uniquely carries compared to what is available to those subscribers over the air from local television stations. The more attractive the cable television system can make its unique services, i.e., its own cable program originations and the imported distant signals, the more subscribers the system will get and the smaller will be the audience of the local television station. The smaller the audience the local television stations has, the weaker the service it is able to render. The weaker the local television service, the stronger the position of the cable system. The weaker the local television station, if it is a network affiliate, the weaker the television network.

This one-way unfair competition of cable television with broadcasting is the inevitable result of the absence of copyright protection against cable television use for the programs contained in broadcast signals.

CBS' POSITION

OBS' position is that cable television systems should be required to bargain in the marketplace for the copyrighted programs contained in both local and distant broadcast signals, just as broadcast stations do. Subjecting cable television systems to the normal operation of the television marketplace would not involve the Congress or any governmental agency in setting rates for the cable television's use of programs. Those rates would be set in the marketplace by give-and-take bargaining between the copyright owner and the user. That would eliminate the unfair competition I have referred to.

Nevertheless, in my testimony on June 12 before the Subcommittee, I gave qualified support to the compulsory license provisions for cable television in Section 111. The reason, as I stated then, is that CBS has "reluctantly concluded that there is just no possibility that the Congress will pass legislation subjecting cable television to the full operation of the law." Because CBS believes it critical that the principle of statutory copyright liability for cable system carriage of copyrighted programs contained in broadcast signals be established, CBS supported the compromise on the condition that the Copyright Royalty Tribunal would be available as provided by Section 801(b) to assure the possibility that future royalty rates might be reasonable.

TELEPROMPTER'S PROPOSAL

Section 111 now includes and has long included provisions which, taken together with other sections of the bill, would subject cable television to copyright liability for the carriage of the programs contained is 'oadcast signals but which would give cable television the inestimable additing of having a compulsory license to carry those signals at rates which cannot be regarded as more than nominal. Nevertheless, at the eleventh-hour, Teleprompter now makes an ill-concealed attempt to reduce its liability drastically without reducing cable television's ability to carry both local and distant broadcast signals.

Teleprompter proposes to make a distinction between local and distant signals (for purposes of payment but not of permitted use). It proposes that cable pay nothing for the programs contained in local signals. It attempts to justify this exemption by saying on p. 1 of its Memorandum that "everyone seems to agree that, as a matter of pure logic, there is no justification for imposing copyright liability on cable's retransmission of local signals." This is not an argument. It is no more than an observation. And it is false. Copyright proprietors certainly do not agree that there is no justification for copyright payments by cable systems that sell their subscribers retransmitted copyrighted programs contained in local broadcasts. Broadcasters certainly do not agree. Building on this false foundation, Teleprompter then indicates on p. 2 of its Memorandum that "the entire nation is really "local" to the network." Teleprompter concludes from this in the next sentence that "a copyright owner who sells his product to a network anticipates that the product will be viewed throughout the entire country and is compensated accordingly." What Teleprompter unblushingly

claims is that somebody else, like it or not, pays the bill for cable television's free ride. As a matter of elemental fairness, cable television should pay for its own ride. Under Teleprompter's scheme somebody else would continue to pay for it.

The Teleprompter scheme would enable cable television to continue to use local broadcast signals and network signals without any payment for them in order to build an audience and a revenue base to enable cable to import distant broadcast signals and to originate its own programs with which to undermine the audience and the revenue base of local competing broadcast stations.

Laving disposed to its own satisfaction of the necessity for payments for local programming and for network programming, Teleprompter indicates on p. 4 of its Memorandum that in recommending its formula for payment for a distant signal, Teleprompter is "extremely generous" because its formula "completely ignores the benefit to the originating station (and thus to the copyright owner) of cable's carriage of distant signals."

Because of the completely oversimplified and misleading nature of Teleprompter's cavalier claim that cable confers such a benefit, it is necessary at this point to include an analysis of a hypothetical, though typical, distant program importation situation so as to make clear the effect of the cable television system's free ride not only on the cable-carried distant station, but also on the economic interests of the other parties affected by the importation.

ANALYSIS OF THE EFFECTS OF CABLE TELEVISION SYSTEM IMPORTATION

One purpose of our analysis is to discover in a general way who pays the bill for the distant cable television system's free ride. Another purpose is to observe the distortion caused by the free ride to our general economic system as it applies in this anomalous area.

(i) Effect on the Program Supplier

Obviously, the carriage of a program by a cable system severely limits the possibilities of sale of that program to a television station in the market. So, unless the program supplier is compensated for it, the supplier is always injured by the use of his program in any market or potential market—and every cable television system community is a market or potential market for the program supplier. The program supplier must look to the television station whose signal is carried in the distant market for any compensation the supplier may get for the cable system use there. This is so because under the governing copyright structure the program supplier's only license negotiation for the use of its program is with that television station. The supplier cannot even seek to be paid where it should—the supplier does not have any legal means to force any payment from the cable television system. Whether the supplier will succeed in getting the television station to pay for the cable system use will depend on the strength of the supplier's bargaining position vis a vis the broadcast station. In some situations the supplier will succeed, in some the supplier will not.

Conclusion.—The program supplier is injured by the distant cable system carriage unless the supplier is able to secure payment from the broadcast station the supplier licenses and whose signal is carried in the distant community.

(ii) Effect on the Broadcast Station Whose Signal is Carried By the Cable Television System in the Distant Community

The broadcast station, in contracting for the program, will try to avoid paying the program supplier for the cable television system's use of the program in the distant market. Whether the station will succeed will depend on its bargaining position vis-a-vis the program supplier. In turn, when the broadcast station deals with a potential advertiser it will try to get a payment from the advertiser for the distant market coverage. Whether the station will succeed will depend on its bargaining position vis-a-vis the advertiser. One factor significantly affecting the bargaining will be whether the advertiser has an outlet it the distant market for its goods or services, for without such an outlet the advertiser will derive no benefit there from the increased viewer exposure to the advertisement.

If it be objected that the program supplier is not injured by the caple system carriage in a community where there is no television station, the answer is that the cable television system itself is a potential customer of the program supplier. Cable television systems originate programs of their own and free carriage by the cable television system of the program in question climinates the possibility of a sale by the program supplier of the right to the cable system to cablecast the program.

Additionally, of course, the broadcast station must bear the risk that no adver-

tiser will be found for the program.

Conclusion.—The broadcast station whose signal is carried is sometimes injured by the distant cable system carriage. When the station is not injured it is because it is able to resist paying the program supplier for the distant community, the advertiser may switch its business to a competitor of the broadcast get paid by the advertiser for the distant community.

(iii) Effect on the Advertiser in the Program Carried in the Distant Community

The advertiser will try to avoid paying for the cable television system's use of the program in the distant market. Whether the advertiser will succeed will depend on its bargaining position vis-a-vis the station. That position will be affected by whether other advertising outlets are available to the advertiser. Faced by a demand from the broadcast station for payment for the distant community and/or because it finds an advertiser for the program and manages to station (to another broadcast station if there is one, perhaps whose signal is not carried in the distant community) to avoid paying for the distant market. However, in some cases the advertise, will have to pay for advertising coverage which the advertiser does not want and which will do it no good, e.g., when the advertiser does not offer the advertised goods or services in the distant market.

Conclusion.—The advertiser is sometimes injured by the distant cable system carriage. When the advertiser is not injured it is because the advertiser is able to resist paying the station for the distant community and/or because the adver-

tiser benefits from the advertising in the distant community.

To summarize, the effect of the free ride by cable television on these parties, each of whom must bargain in the marketplace, is: There is always an initial economic injury to the program supplier. He tries to pass the burden to the television station he licenses whose signal is carried in the distant cable community. The station, in turn, tries to pass the burden to the advertiser who may or may not benefit by the distant community carriage. The marketplace bargaining process is distorted. Those who bargain in the marketplace must involuntarily take into account, take risks for, sometimes are injured by, the deliberate operations of an irresponsible entity which does not have to enter the marketplace at all. The cable system bears no burden at all and remains immune from the necessity of paying for its own vital operation—the importation and retransmission of programs contained in broadcast signals.

CONCLUSION

CBS believes the Committee should give short shrift to Teleprompter's eleventh-hour scheme either to forestall copyright law revision entirely—thus preserving the present state of copyright anarchy in the cable television field from which cable television benefits—or to eliminate entirely the possibility that under the revised law copyright payments by cable television for its compulsory license would ever reach a reasonable level. CBS supports the present compromise compulsory license provisions for cable television of Section 111, on the condition that the Copyright Royalty Tribunal would be available as provided by Section 801(b) to assure the possibility that future royalty rates might be reasonable. Sincerely yours,

ROBERT V. EVANS, Vice President and General Counsel.

To: The Honorable Robert E. Kastenmeier.

From: Jack Valenti, President, The Motion Picture Association of America, Inc., and President, The Association of Motion Picture and Television Producers. Re: The Teleprompter Inc. proposal to the copyright bill, H.R. 2223.

This memorandum is in response to your letter on November 4, 1975, inviting our comments on a proposal submitted informally to the staff of your Subcommittee, by Teleprompter, Inc., as a possible amendment to certain sections of the pending Copyright Bill, H.R. 2223.

² When the advertiser's goods or services are not available in the distant market at all, or are not available on the same terms advertised, the advertiser may be injured in another way by the advertising coverage there—the advertiser may have to contend with the wrath of disappointed potential customers.

The members of this Association, the members of the Association of Motion Picture and Television Producers, Inc., and the Committee of Copyright Owners, who together represent the major copyright owners of materials that are viewed over television and cable in the United States, appreciate your courtesy in inviting our views.

The Teleprompter proposal, wholly apart from its merits or demerits, has been surfaced after the conclusion of the Subcommittee's formal hearings involving public witnesses. None of the parties concerned with and affected by section 111 and chapter.8 of the bill, have had the opportunity to testify before the Subcommittee in open session on the one hand to explain and justify the proposal, and

on the other to analyze it and present its alleged deficiencies.

We have nevertheless, upon receiving your letter, sought to comply in the hope that this memorandum and its attachments, will be carefully considered by the Members of the Subcommittee, and of course be made a part of the formal

We have engaged the services of a distinguished constitutional authority to analyze and comment upon the legal question raised as part of the Teleprompter proposal.

Additionally, we have requested one of the most respected and widely recognized economic research firms in the Nation to analyze the mechanics and thrust of the Teleprompter formula in an effort to determine how it would operate, whether it is a practicable and workable idea in the marketplace, and what would be its economic and fiscal effect on various classes of cable systems, on copyright proprietors, and on the public interest.

The Teleprompter proposal consists of three parts:

- (a) a memorandum by Professor Ernest Gellhorn of the University of Virginia concluding that certain provisions of H.R. 2223 concerning copyright Royalty Tribunal are "vulnerable to constitutional attack under the due process clause";
- (b) texts of amendments to the bill which would eliminate the Tribunal's jurisdiction over cable copyright liability and the initial rate schedule in the bill and substitute for them a rather complicated cable-copyright formula; and

(c) a memorandum by the Teleprompter Corporation purporting to explain the formula.

Here is our response to your letter:

1. With respect to the Gellhorn legal memorandum, we submit a memorandum prepared by Professor Louis H. Pollak, Albert M. Greenfield Professor of Law at the University of Pennsylvania Law School, formerly Dean of the Yale Law School, and a recognized authority on constitutional law. This legal brief by Professor Pollak expresses the opinion that the provisions of the bill to which Professor Gellhorn takes exception are constitutional.

2. With respect to the Teleprompter proposal, we submit a detailed and ex-

haustive analysis of that proposal by National Research Associates, Inc.
This analysis has determined that the Teleprompter formula:

Will tend to shift copyright liability from the larger systems to the smaller systems. It does this by exempting many larger cable systems from any copyright liability, pushing the burden of copyright payments to smaller and medium-sized systems, payments which in a number of instances are larger than what they would pay under H.R. 2223.

Will exempt substantial numbers of cable systems and their revenues from

all copyright liability.

Will reduce the overall copyright liability of the Teleprompter Corporation by some 13 percent.

Is ambiguous, and internally illogical, and would be a formidable administrative burden.

The Teleprompter proposal also has these additional deficiencies:

- 1. The text of the Teleprompter amendments to carry out the formula conflicts with the text of the explanatory memorandum. They contradict each other.
- 2. A major element of the Teleprompter formula is the rate base (basic subscriber fees of cable systems) which may be a valid element in today's market, but which is unlikely to be valid in the marketplace in the future.
- 3. The formula is deficient in exempting network signals and local signals from copyright liability:
- (a) The formula erroneously exempts such signals because it ignores the basis on which television advertising fees are computed and copyrighted programs are negotiated with buyers.

(b) The formula erroneously exempts such signals because it ignores the

copyright concept of a separate payment for each commercial use.

4. The formula, if made a part of the Copyright Bill, would give the Commerce Committees an appropriate basis for claiming jurisdiction over H.R. 2223.

If the Teleprompter formula has any validity, the Company is free to submit it to the Tribunal for its consideration in making rate adjustments. The formula does, however, highlight two essential facts: it recognizes the substantial percentage of television broadcasting revenues devoted to procuring programs, and it acknowledges cable's liability for copyright.

The formula would give cable systems a shield of apparent copyright liability but, in practice, allows them to continue to act as parasites, living off the broad-

cast industry and copyright holders.

The cable television industry has become "big business" and is on the way to becoming much much bigger. The Department of Commerce estimated 1974 cable revenues as \$590,000,000 and pre 's that 1975 cable revenues will be three-quarters of a billion dollars. (U.S __ndustrial Outlook, 1975, U.S. Department of Commerce, pp. 311-312)

Under the fee schedule in H.R. 2223, cable would pay less than 1% of its revenues for programming—the one product which is indispensable to it. Yet, Teleprompter acknowledges in its explanatory memorandum that broadcisting pays thirty times that much of its revenues for program material. The NERA report states that 28 percent of broadcasting revenues in 1974 was devoted to program

procurement.

The NERA report points out that the Teleprompter company's own copyright payments would be reduced by more than \$135,000 annually if its formula replaced the pending bill's graduated rate schedule. The Teleprompter systems represent 4.5 percent of the nation's total cable systems. Thus, if a projection of the Teleprompter formula were to be made to all cable systems, a 13 percent slice in total copyright revenues nationally would take place. The effect is to cut nearly \$1 million from the initial annual copyright revenue provided by the graduated rate scale in the bill.

Please keep in mind several crucial facts:

Fact 1: The original McClellan fee schedule was arbitrarily cut in half.

Fact 2: If Teleprompter has its way, the already reduced fee schedule would

be cut still further, by at least 13 percent.

Fact 3: If that occurred, the *total* liability for copyright for *all* copyright owners (not just films and TV material, but also sports and music) would be about \$6 million annually, for an industry with revenues today of some \$700 million annually.

I. THE FORMULA IS CONFUSING AND COMPLEX AND CONFLICTS WITH THE EXPLANATORY STATEMENT

A crucial element of the Teleprompter formula is that copyright is to be imposed only in the case of signals a cable system is not required to carry. Put arother way, all signals (programs) that the Federal Communications Commission requires a cable system to carry are to be exempt from copyright liability. But Teleprompter's explanatory memorandum says something else: local signals will be exempt from copyright while non-network distant signals will be subject to copyright.

Obviously, the formula text and the explanation contradict each other. Depending on the television market and other factors, some cable systems are required to carry what would normally be classed as distant signals. At the same time, some cable systems carry, but are not required to carry, local signals. Thus, the formula text fails to distinguish between local and distant signals and, in fact, imposes copyright liability for some local signals and at times exempts

distant signals.

This contradiction and inconsistency is also apparent when basic sub riber revenues are multiplied by copyright owner's percentage share and the total is multiplied by 100. The result converts percentages into whole numbers which produces astronomical copyright liability for a number of cable systems. Clearly such systems would strongly protest such a formula.

One other contradiction exists. The second element of the formula is based on all broadcasting (radio as well as television) revenues and program expenses. Yet the explanatory memorandum speaks in terms of television revenues and broadcast expenses. While this additional conflict is obviously not fatal, it does

evidence the lack of careful consideration that went into putting the Teleprompter

package together.

Another example of the complexity of the formula is the burden that will fall on the FCC in certifying once every three months which signals are subject to liability and the "popularity" of each of those signals on a county-by-county basis. With more than half of the 3,200 cable systems subject to copyright liability, and assuming an average of two distant signals per each system, the FCC would be required to make 14,080 determinations annually, each of which could be the subject of a dispute.

Finally, the formula gives cable television a special incentive to petition the FCC to increase the number of required signals. Such a procedure grants cable additional signals with which to attract cable subscribers but the direct effect will be a reduction in copyright liability. In other words, cable will enjoy a double

benefit—one of which is circumvention of copyright.

II. USING BASIC CABLE SUBSCRIBER FEES AS A PERMANENT ELEMENT OF THE FORMULA IS INVALID

The first element of the formula is basic subscriber revenues received by a cable system. The Teleprompter proposal would therefore lock into law, as the rate base, an element which is not likely to be a valid base for the future.

As admitted in oral argument before the Supreme Court in United States v. Midwest Videc (406 U.S. 649, 1972, reported in 40 Law Week 3509), as cable advertising revenues increase, basic subscriber fees can be reduced. In short,

advertising revenues will be used to provide basic subscriber services.

Another means of reducing basic subscriber fees is through the use of pay cable. For example, a cable system can sharply reduce a \$6 a month basic cable subscription fee as an inducement to the basic cable subscriber to become a paycable user for fees that range from \$9 to \$12 per month for the pay cable channel. Indeed, at the 1975 National Cable Television convention in New Orleans, panel participants explained this policy as an effective means of securing pay-cable subscribers whose higher subscription rates would sharply increase cable system

These are just two methods of circumventing copyright liability under the Teleprompter formula. Doubtless, cable systems will find others. This is not to denigrate cable systems for doing so. They have a product to sell, and they will use means available to them to promote cable in the marketplace. But copyright owners should not be penalized, and cable copyright liability effectively nullified,

because the methods of merchandising cable television change.

The Register of Copyrights testified before the Subcommittee on October 30, 1975, that she does not favor giving the Tribunal the power (as H.R. 2223 presently does) to change the rate base from basic subscriber revenues to another base: "In our opinion, this is a legislative function that should not be delegated." (Draft of Second Supplementary Leport of the Register, chapter V, page 30). The Register did not state whether her opinion is based upon constitutional

grounds or policy reasons. On either basis, she is incorrect.

Professor Pollak, in his attached memorandum, has already made clear beyond any doubt that rate-making is a function which may be delegated. More importantly, the standard of "reasonableness", without any further embellishment, is a constitutionally acceptable standard when Congress delegates a rate-making authority. (See pages 6-8 of Professor Pollak's memorandum, attachment A, and cases cites therein.)

As a policy matter, there is no justification for not delegating to the Tribunal the authority to determine an appropriate rate base. The Supreme Court has recognized that prescribing rates involves several steps, generally two primary steps in determining a fair rate of return:

(1) the determination of the rate base, and(2) the adjustment of the rate schedule. (See EPC v. Natural Gas Pipeline Co., 315 U.S. 575, 1942.)

In short, the administrative agency is best suited to determine the rate base in adjusting rates, and this rate base may change from situation to situation. (See Permian Basin Area Rate Cases, 390 U.S. 747, 1968.)

Consistently, Congress has recognized that market situations change and that it does not have the expertise or time to determine rate bases and has, therefore, delegated that authority to administrative agency discretion using a standard of reasonableness. Examples of this delegatic: include the FCC for wire and radio common carriers ("just and reasonable", 47 U.S.C. § 205); the Federal Power Commission for natural gas company rates ("just and reasonable", 15 U.S.C. § 717c); the Interstate Commerce Commission for common carriers of passengers and property ("just and reasonable", 49 U.S.C. § 1(5); the Civil Aeronautics Board for air carriers, ("just and reasonable", 49 U.S.C. § 1374); the Federal Maritime Commission for vessels in commerce ("just and reasonable", 46 U.S.C. § 817); and the Postal Service and Postal Rate Commission for postal rates ("reasonable and equitable", 39 U.S.C. § 3621).

Therefore, the Tribunal may be delegated authority constitutionally, to change the rate base. As a policy matter, the Tribunal should have the authority to determine the rate base for cable copyright because Congress has neither the time nor expertise to determine a fair rate base. The marketplace, especially for cable, is fluid and what may be a fair rate base today is not likely to be reasonable tomorrow. Changes may be made in subscriber rates having the effect of hiding or sheltering from copyright liability, revenues that are properly

allocable to providing the basic cable service to subscribers.

III. THE FORMULA IS DEFICIENT IN EXEMPTING NETWORK SIGNALS AND LOCAL SIGNALS FROM COPYRIGHT LÍABILITY

A: The formula erroneously exempts network and local signals because it ignores the basis on which advertising fees are conputed and copyrighted pro-

grams are negotiated with buyers.

The Teleprompter formula excludes network signals and required signals from copyright liability on the assumption that advertisers pay broadcasters for cable coverage and broadcasters, in turn, pass on this compensation for cable coverage to copyright holders. These assumptions are false, and the formula is therefore also deficient in this respect.

1. Advertisers Do Not Pay for Cable Coverage

Network officials and advertising time buyers assert that cable coverage is not a factor and is not weighed in determining national network or spot program purchases.

The executives of five major purchasers of national advertising time on the three networks totaling some \$434.5 millions annually, affirm that there is no breakout for and no specific charge in the rate card or any allocation in the advertising budget for cable coverage.

Harry Schroeter, vice president-communications for Nabisco, Inc., and former chairman of the Association of National Advertisers, says that advertisers have very little interest indeed in the audience reached over cable through importa-

tion of distant signals.

Richard A. R. Pinkham, Chairman Executive Committee of Ted Bates & Co. (the sixth largest advertising agency with \$136.5 million in television advertising billings in 1974) said that in his company the subject of cable coverage is not considered or discussed with any of his advertising clients.

Harry D. Way, manager of media planning for Colgate-Palmolive-Peat, a buyer of \$76.5 million of national television advertising, says that cable coverage is not considered in their buying (of advertising) and selling (their product)

operations.

Peter Bardach, vice president and director of broadcasting for Foote, Cone & Belding, a major agency that buys time for Lever Bros., which spends \$81 million annually for television advertising, says that in none of his agency's purchases (of national television advertising) is cable coverage considered or even discussed; the price of the spot or program purchased is based solely on its assumed total circulation.

R. L. Condit, media director for Proctor and Gamble, the largest dollar volume television advertiser in the country, says that P & G considers it impossible to quantify any percentage of their advertising budget for cable coverage. (See attachment C for additional details.)

2. Networks Are Not Paid for Cable Coverage

Max Buck, vice president for national sales for the NBC Network states unequivocally that he "never even discusses cable coverage" with an advertiser) for does he recall ever having been asked any questions about it.

Jos. Cowden, assistant to the President of CBS Television Network, and Jay Eliasberg, vice president of CBS Television Network Research, concur in Mr. Buck's statement and agree that (network) sales are now "individual negotia-

tions" per spot and are based on the total number of homes reached and the "quality" of the program. (See attachment C for additional details.)

3. Copyright Owners Are Not Paid for Cable Coverage

(1) Statements of eleven program buyers and sellers, some with twenty and twenty-five years' experience, refute the cable industry contention that television stations and their program suppliers are able to charge more to their buyers because of the increased audience available through cable carriage.

(2) Stations do not and cannot obtain incre. sed advertiser payments for cable carriage to additional homes beyond their market. Advertisers buy time on the basis of Neilson or ARB reports of that area where the station delivers a majority of the viewers (the Area of Dominant Influence or the Designated

Market Area).

a. Homes beyond that area are of no interest to local advertisers:

"Local advertisers are interested only in viewers in the metropolitan area in which they conduct their business, recognizing that the customer potential from distant homes is marginal at best"—Kent Replogle, President, Metromedia

"Additional viewers hundreds of miles away are not a market for local advertisers, nor will they pay for the privilege of exposing their messages to these far-away viewers"—Crawford Rice, V.P., KSTW-TV, Tacoma.

b. National and regional advertisers, covering the markets they choose by

buying exposure to numerous ADIs, will not pay more simply to have that ex-

·posure duplicated:

"Homes outside this station's ADI simply do not figure in the price of advertising"-James Terrell, Chairman, Association Independent Television Stations. "Advertisers are value conscious and will not pay for wasted coverage or for coverage that is not measured by audience ratings within the immediate market

area"-Frank Reel, President, Metromedia Producers Corp.

"Approximately 142 (of the 170 cable systems carrying WGN) are located beyond the Chicago ADI. . . . (T)hc price of advertising purchased on our station reflects only the homes we reach within the ADI"—Sheldon Cooper, Vice President and Station Manager, WGN, Chicago.

(3) Program suppliers do not and cannot receive additional money from

stations whose signals are picked up by cable systems.

a. The number of cable households reached is irrelevant in setting a program price.

"In determining a sale price, we analyze (the history of sales in that market, market rank, number of competing stations, our costs, the buyer's needs). The sale price has no relationship to the number of increased cable viewers"—Keith

Godfrey, Executive Vice President, MCA-TV, Los Angeles.

"Cable carriage in enlarging distant audiences plays no part in price determination at all. The primary factor in syndication pricing is supply and demand. When there are more stations in the market, there will be more bidders for the program, and accordingly the price will be higher"—Erwin Ezzes, Chairman and CEO, United Artists TV.

b. The money that can be spent on program buying is diminished when station revenues are harmed by audience fragmentation due to cable carriage of distant

signals:

If a cable system carries a program from the bigger markets to the smaller markets, syndication therein becomes difficult because cable importation reduces the value of the program to the buying station. As a result . . . a television station may refuse to license a syndicated program or may license it only by paying a lower price . . . because its potential audience has been or will be exposed. . . ."—Frank Reel. Pres., Metromedia Producers Corp.

"A network acquires rights to the whole United States and would not pay

more money for cable retransmissions, especially since network affiliates are faced with competition for their own local spot commercials when the same programs are imported by CATV with the local spot commercials of the distant

station."-Erwin Ezzes.

"The only time CATV audiences are discussed in program negotiations is when a buyer seeks to depress the price of a program because part of his potential audience has already been exposed to the program or series by CATY"—Frank Reel.

"Cable brings to (Johnstown and Altoona) the signal of WTAE-TV in Pittsburgh, a station that is 75 to 100 miles away from . . . the area served. . . . The Pittsburgh station can't sell this coverage, but the viewers watching its program, obviously, are not watching the local stations... In short, cable has fractionalized the local viewing audience... Or look at Binghamton, New York... is share of audience viewing signals other than those in the market has risen in 2% in November 1963 to 25% in May 1975.... The reason? The growth of cable systems in the area, systems that import three signals from New York City 200 miles away and additional signals from Syracuse and Wilkes-Barre-Scranton." George Koehler, President, Gateway Communications, Cherry Hill, N.J.

c. The economics of program marketing insulate program buyers from higher

prices:

"There are only a limited number of stations in each city and . . . the all-important time left for non-network programing is severely limited. Accordingly, since many programs compete for sales to such limited outlets and there is always more product than time available for syndicated programs, there exists a perpetual and structural "buyers" market that is not and cannot be affected by increases in coverage due to CATV."—Frank Reel.

(See attachment D for the complete statements.)

B. The formula erroneously exempts network and local signals because it ignores the concept of a separate payment for each commercial use.

As already pointed out, the Teleprompter formula exempts from copyright, network signals and required signals. These exemptions ignore the traditional concept of copyright law of a separate payment for each commercial use.

As the Register of Copyrights so well explained in a letter to Senator John

McClellan last year:

"The Constitution directs Congress to legislate to secure to authors exclusive rights in their writings. Reward to the author and his legal successors is essential to stimulate creativity. We are all enriched by this creativity. It is surely not too much to expect that some payment to copyright proprietors will be made for commercial uses of copyrighted works."

Or as the Supreme Court has formulated the reason for copyright:

"The economic philosophy behind the (constitutional) clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." (Mazer v. Stein, 347 U.S. 201, 219, 1954)

The right of copyright should not be sacrificed to every other right—nor should it ever be sacrificed to economic or technological expediency. To quote again the Register of Copyrights: "The basic human rights of individual authors throughout the world are being sacrified more and more on the altar of . . . the technological revolution."

Cable systems use network signals and required signals as means of attracting subscribers and promoting their industry. They should be required to pay copyright for all signals they carry.

IV. THE FORMULA WOULD GIVE THE COMMERCE COMMITTEES AN APPROPRIATE BASIS FOR CLAIMING JURISDICTION OVER H.R. 2223

Under the formula, the FCC is required to certify every three months to the Register of Copyrights the "copyright owners' percentage share" which is determined by dividing all broadcast revenues into all broadcast program expresses and multiplying the result by 100. The formula also requires the Commission certify, on a quarterly basis, the market share ("program popularity") of acts signal carried by the cable system which is subject to copyright liability. The FCC is therefore given the duty of collecting or obtaining program ratings on a signal-by-signal and county-by-county basis, or else, using the literal language of the formula text, collecting or obtaining total viewing hours on a signal-by-signal and county-by-county basis.

The formula would therefore impose on the Commission specific mandatory duties; it does not simply rely upon existing duties of the Commission to trigger automatically the operation of certain provisions of the contrigular revision bill. Since jurisdiction over the FCC is vested in the Senate Committee on Commerce and the House Committee on Interstate and Foreign Commerce, these committees could appropriately assert jurisdiction over the bill. This assertion would further delay the passage of the bill and likely insure that no copyright bill would be enacted this Congress, especially since it now appears that the Subcommittee is

not likely to begin markup before mid-January, 1976, and the Congressional leadership has announced its intention to adjourn the 94th Congress on October 2, 1976.

[Attachment A]

OPINION AS TO THE CONSTITUTIONALITY OF CERTAIN PROVISIONS OF H.R. 2223

INTRODUCTION

Now pending before a sub-committee of the House Judiciary Committee is H.R. 2223, a bill "for the general revision of the Copyright Law." This bill in its major aspects parallels S. 1361, which was approved by the Senate in the Second Session of the 93rd Congress. If H.R. 2223 is enacted into law, Congress will have finally completed comprehensive overhaul of the Copyright Law of 1909 a major revisory effort which Congress initiated twenty years ago.

In a Memorandum dated October 14, 1975, Professor Ernest Gellhorn has advanced the view that certain provisions of H.R. 2223 are "[a]s presently drafted . . . unnecessarily vulnerable to constitutional attack under the due process clause." At the request of counsel for the Motion Picture Association of America, I have examined the challenged provisions of H.R. 2223 in the light of Professor Gellhorn's Memorandum. In my judgment, these provisions are secure against constitutional attack.

THE CHALLENGED PROVISIONS OF H.R. 2223

The provisions of H.R. 2223 to which Professor Gellhorn's Mcmorandum is addressed are those relating to the unauthorized interception and secondary transmission by cable television of authorized primary television transmissions of copyrighted matter. These provisions—embodied in S. 1361 and now brought forward to H.R. 2223—seek to cure the anomalies introduced into the copyright system by the Supreme Court's determination that the present Copyright Law affords the copyright owner no protection against cable television's unconsented and highly remunerative dilution of the copyright.

In order to protect the copyright owner, while simultaneously encouraging cable television's dissemination to a wider public of copyrighted matter which has been televised, H.R. 2223 utilizes the "compulsory license"—the device which, with respect to copyrighted music which the copyright owner has permitted to be recorded, has been a central feature of the copyright system ever since 1909.

Section 111 of H.R. 2223 recites the conditions under which a primary television transmission of copyrighted matter is subject to a compulsory license authorizing a secondary transmission by cable television. Section 111 (d) (2) (B) establishes a scale of royalty fees for such secondary transmissions—a scale which is graduated in relation to the quarterly gross receipts of the cable system. The scale is that contained in Section 111 of S. 1361 as adopted by the Senate in

The adequacy of the royalty fees established in S. 1361, and now appearing in H.R. 2223, was one of the most sharply contested issues in the Senate Judiciary Committee's consideration of S. 1361. In the sub-committee version of the bill, the fee schedule was twice what the full committee ultimately agreed upon: the original fee schedule was, as Senato. Tunney observed, "cut in half by a twovote margin during the full committee markup of the copyright bill," an action which the Senator opposed because in his "judgment the original fees were quite modest in terms of the costs impose apor the cable operators and reasonable w'" respect to the interests of the copyright . wners." 2

But although the Senate Judiciary Committee was closely divided on the adequacy of the particular royalty fee schedule written into S. 1361 (and now reproduced in H.R. 2223), they were united in the view that the schedule should be

¹ Fortnightly Corporation v. United Artists Television, Inc. 392 U.S. 390 (1968); Teleprompter Corporation v. Columbia Broadcasting System, 415 U.S. 394 (1974). See Cable Television and Copyright Royalties, 83 YALE L. J. 554 (1974).

² Copyright Law Revision, S. Rep. No. 93-983, 93rd Cong., 2nd Sess., p. 217 (Additional Views of Se ator John V. Tunney). Compare the assessment in Cable, Copyright, Communications Controversy, 24 CLEVE. STATE L. REV. 107, 145 (1975), that S. 1361 as it emerged from the Senate Judiciary Committee was "a clear victory for CATV." The royalty schedule contained in S. 1361 as adopted, and new contained in H.R. 2223, calls for a "total royalty fee" of ½% of a cable operator's quarterly gross receipts up to \$40,000, running up to a maximum "total royalty fee" of 2½% of quarterly gross receipts in excess of \$160,000.

subject to mandatory periodic reappraisal. In this way, the Senate Judiciary Committee contemplated that the new Copyright Law would avoid imposing a permanent economic strait-jacket on copyright owners and on the cable television industry. The problem was well understood by the Senate Judiciary Committee because of its familiarity with the fixed statutory royalty which has governed the compulsory license for recordings of copyrighted music since 1909. For lack of any required periodic reappraisal of the 2-cents-per-recording legislated in 1909, the royalty has been frozen at that level for over six decades. Not too surprisingly, S. 1361 (here again emulated by H.R. 2223) called for a substantial increase in the 1909 recording royalty. Moreover—and of greater relevance to the cable television provisions of S. 1361 and H.R. 2223-S. 1361 (again followed by H.R. 2223) also mandated periodic reappraisal of the recording royalty, and by the identical process to which, under the bill, the revision of the cable television royalty schedule is committed. It is that process, initially elaborated in S. 1361 and now reaffirmed in H.R. 2223, which Professor Gellhorn calls into question.

The process questioned by Professor Gellhorn is, in its essence, a very simple one. Two years after the effective date of H.R. 2223,—and at five-year intervals thereafter, if requested by a copyright owner or user—the Register of Copyrights is to convene a Copyright Royalty Tribunal composed of three members of the American Arbitration Association nominated by that body.3 The Tribunal is directed to hold hearings at which interested parties may appear by counsel. And on the basis of the hearings the Tribunal determines whether the royalty rates and/or rate bases specified by Section 111 (or by a prior Tribunal's adjustment of the Section 111 rate and/or rate base) "are reasonable." Section 801(b). The Tribunal's determination (which is to be reached within a year) "shall be in writing and shall state the reasons therefor." Section 804(d). Each such determination is to be transmitted to each House of Congress. If the Tribunal's determination recommends an adjustment of the prevailing royalty rates or bases, that recommendation is to go into effect on the one-hundred and eightyfirst legislative day after transmittal, unless within ninety days of transmittal "either House of Congress adopt[s] a resolution stating in effect that the House does not favor the recommended royalty adjustment," in which event "such

DISCUSSION OF THE ASSERTED CONSTITUTIONAL DIFFICULTIES

The compulsory license has been an important instrument of copyright policy and practice since 1909. For more than six decades, the several constituencies which comprise the music industry have operated within its ambit and thus subject to a flat, legislatively determined, royalty. Whatever may be said as to the wisdom of these arrangements, they do not appear to have been the subject of any serious constitutional question.

Aware that the inflexible 1909 royalty has spawned consequences which, while not heretofore provoking any constitutional challenge, have been detrimental to the copyright system, the Committees responsible for S: 1361 and H.R. 2223 have sought to soften the perceived rigors of the compulsory license system both as applied to the familiar field of musical recordings and as applied to the new field of cable television. Yet, curiously, it is the attempt to ameliorate the rigor of the

present statute which is said to pose constitutional difficulties:

adjustment . . . shall not become effective." Section 807(a).

(1) The first constitutional difficulty identified by Professor Gellhorn's Memorandum is the asserted opacity of the term "reasonable" as employed in Section 801(b) to guide the Copyright Royalty Tribunal in determining whether to recommend an adjustment of the royalty rate or base. "Reasonable" may or may not be thought to be self-defining; but it is, in any event, a venerable statutory standard often sustained by the Supreme Court (as, for example, in phrases such as "just and reasonable" 5). Indeed, as the Court of Claims recently observed, "The standard of reasonableness has . . . become the mainstay of our law." 6

³ A nominee is subject to challenge, for cause shown, by an interested party. Section

³ A nominee is subject to enamence, for cause such, 1803(a).

4 See I Nimmer, Copyright (1975 ed.) § 7.

5 See, e.g., Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930); Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575 (1942); Montana-Dakota Public Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951).

6 "The great function in the law of the word 'reasonable' is to enable a standard of decision to be accommodated to all circumstances. 'Reasonable', 1870 for this purpose, has served in legal instruments at least since Magna Carta, in which King John undertook not to levy 'more than a reasonable aid' or tax to raise a ransom for his person. The standard of reasonableness has since become the mainstay of our law." National Steel and Shipbuilding Co. v. United States, 419 F. 2d 863, 876 (1969).

Objection to "reasonable" may perhaps be taken on some aesthetic level, but

hardly on the ground that it offends constitutional norms.

The point, of course, is not that, in the formulation of statutory standards for the guidance of agencies doing the legislature's bidding vagueness is to be prized. The point is that in many instances—and the proportion of these instances increases with the complexity and multiplicity of the jobs government undertakes—categorical delineation is an illusory objective. The point is succinctly illustrated by a comment made by Professor Kenneth Culp Davis on a sequence of two New Jersey cases:

In the first case, decided in 1949, the New Jersey Supreme Court invalidated, for lack of adequate standards, a statute providing for compulsory arbitration of labor disputes between a public utility seized by the governor and the employ-ees of the seized utility. The New Jersey Legislature then passed a new compulsory arbitration statute, directing the arbitrators to "make a just and reasonable determination of the dispute," and outlining a number of amorphously contoured sub ingredients of "just and reasonable" which were to be taken into consideration by the arbitrators. The New Jersey Supreme Court upheld the new statute, finding the new standards "adequately definitive."

Professor Davis, plainly skeptical of the first decision, welcomed the second,

but wholly disagreed with its rationale:

The protection against arbitrariness did not lie in the statutory standards: it lay in the procedural safeguards, especially in the requirement of written findings of fact "upon the issue or issues." 10

In similar fashion, Section 804 of H.R. 2223 requires the Copyright Royalty Tribunal to proceed with procedural regularity and to render a decision which "shall be in writing and shall state the reasons therefor."

(2) Professor Gellhorn's Memorandum also takes exception to the composition of the Copyright Royalty Tribunal. The asserted defects are two-fold:

The first of these is that the Tribunal has no continuity of membership. Because of this, so it is argued, the Tribunal members will not acquire the case-by-case expertise which could over time give content to the statutory standard. The argument has a superficial appeal, but it is an appeal which loses much of its weight when it is recalled that the Tribunal will only be convened to consider adjustment of the cable television royalty schedule at five-year intervals." Of course, a plausible case can be made for constituting the Tribunal as a continuing body on a stand-by basis; but it would be extravagant to contend that such an elaborate structure is constitutionally compelled.12

The second objection to the Tribunal's composition is that the Tribunal is to be selected from members of the American Arbitration Association. "Arbitration," says Professor Gellhorn, "involves no tradition of adherence to precedent or to some consistent principle of decision. It treats each case on its own bottom and therefore evolves no reliable way to handle future cases." (Gellhorn Memo-

randum, p. 9).

With all respect, Professor Gellhorn's strictures about arbitration seem somewhat beside the point. The fact that the Tribunal is to consist of persons with broad arbitral experience does not, of course, show that their role as Tribunal members is to be arbitral in nature. With equal justice, it could be argued that Article 4 of the Statute of the International Court of Justice is defective insofar as it vests the critical responsibility of nominating Judges of the International Court of Justice in "the national groups in the Permanent Court of Arbitration." It is H.R. 2223, not membership in the American Arbitration Association, which defines the function of the members of the Copyright Royalty Tribunal. Their function is not to arbitrate disputes, it is "to make determinations concerning the adjustment of the copyright royalty rates specified by Sections 111 and 115 so as to assure that such rates are reasonable," 13 and, when adjustment appears

 ⁷ State v. Traffic Telephone Workers' Federation, 66 A. 2d 616, 2 N.J. 335 (1949).
 8 New Jersey Beil Tel. Co. v. Communications Workers, 75 A. 2d 721, 729, 5 N.J. 354 (1950).P Ibid.

Pibld.

10 Davis. Administrative Law Text (1972) n. 38.

11 H.R. 2223 also yests in the Tribunal the authority to adjudicate controversies as to the distribution of cable television royalties among numerous claimants (see §§ 111(3)B, 801(b)(2). 208), but this aspect of the Tribunal's work appears to lie outside the main thrust of Professor Gellhorn's objections to H.R. 2223. See Text at notes 17 and 18, infra.

12 See note 15 infra.

13 Section 861(b). (Section 111 royalty rates ar hose relating to cable television; Section 115 royalty rates are those relating to increcords"—i.e., recordings of copyrighted non-dramatic musical works. Although Professor Gellhorn's Memorandum seems to be confined to the field of cable television, his arguments would appear equally applicable to phonorecords").

warranted, to transmit to Congress "the recommended royalty adjustment." 14 To convert the professional status of the Tribunal members into a challenge to the validity of the Tribunal seems an exercise in semantics rather than in constitutional law.15

(3) Professor Gellhorn also expresses concern at the lack of any provision in H.R. 2223 for judicial review of Tribunal decisions in royalty adjustment proceedings. Given the architecture of Chapter 8 of H.R. 2223, it seems a fair inference that the bill does not contemplate direct judicial review of such decisions. For it is plain that direct review of such decisions is vested in, and is indeed obligatory upon, Congress, inasmuch as a veto by either the House or the Senate prevents the going into force of the Tribunal's "recommended regalty adjustment." By contrast, when the Tribunal performs its separate and very different function of adjudicating controversies with respect to the distribution of cable television royalties (a function apparently not within the ambit of Professor Gellhorn's chief objections to H.R. 2223), the federal district court—not Congress--is the specified forum for review.18

However, there is not a syllable in H.R. 2223 which precludes judicial review of royalty adjustments recommended to Congress after recommended adjustments have been acquiesced in by Congress (through the failure of either chamber to act in the negative) and have gone into effect. A challenge to a new royalty rate—asserting, for example, that it is confiscatory or that the determination that it is "reasonable" is not supported by substantial evidence—would seem a fit issue for judicial determination. Moreover, the propriety of such judicial review—subsequent to Congressional acquiescence in the new royalty rate—would seem to be supported by relevant precedent. It will be recalled that in a series of statutes Congress has vested in the Supreme Court authority to promulgate, and amend, the various sets of rules governing procedure and evidence in the federal district courts, subject to review by Congress before such rules or amendments take effect.10 But it will also be recalled that the Supreme Court has consistently held that the validity of the rules which it and Congress have approved is open to subsequent judicial inquiry when challenged in an appropriate case or controversy.20

In short, one may be permitted to hope that H.R. 2223 would be judicially construed as authorizing judicial inquiry, in an appropriate case, into the reasonableness of the royalty rate schedules attendant on H.R. 2223's system of compulsory licensing, whether those schedules be the ones initially written into H.R. 2223 or thereafter adjusted through the action of the Copyright Royalty Tribunal and the acquiescence of Congress. But for immediate purposes it suffices to say that the absence of specific provision in H.R. 2223 for judicial review of compulsory license royalty rates cannot be thought a greater constitutional infirmity than the absence of such a provision in the existing Copyright Law which has, as to musical recordings, linked compulsory licenses and fixed, legislatively declared, royalties ever since 1909.

(4) Finally, Professor Gellhorn (in what may appear a volte face from his concerns about undue Congressional delegation to the Tribunal) expresses misgivings about the propriety of the statutory reservation to each legislative chamber of authority to vote down a royalty rate adjustment recommended by the Tribunal. This devi.e, Professor Gellhorn says, "could be objectionable as an unconsitutional effort to legislate without Presidential approval." Gellhorn Memorandum, p. 10.

¹⁴ Section 807 (a).

15 Cf. Professor Gellhorn's quotation (in a footnote on p. 8 of his Memorandum) from State v. Traffic Telephone Workers Federation, 2 N.J. 335, 66 A. 2d 616 (1949), a case in which arbitrators plainly were intended to act as a "board of arbitration." As indicated in the text at note 7, supra, the court's holding was that the compulsory arbitration statute was invalid for lack of adequate standards. Moreover, to the extent that dicta expressed misgivings about the impermanence of the "board of arbitration", the dicta must be regarded as qualified by the same court's upholding of a redrafted cumpulsory arbitration statute a year later, in New Jersey Beli Tel. Co. v. Communications Workers, 5 N J. 354, 75 A. 2d 721 (1950). See notes 7, 8 and 9, supra.

15 Section 807 (a).

17 See note 11, supra.

18 Section 809. The limited scope of review contemplated by Section 809 suggests that in resolving such controversies (as opposed to adjusting royalty rates) the Tribunal is expected to act in an arbitral capacity. See Copyright Law Revision, S. Rep. No. 93-983, 93rd Cong. 2nd Sess. pp. 205-6.

19 28 U.S.C. \$\$\frac{1}{2} 2072. 2077 and 2076: 18 U.S.C. \$\frac{3}{2} 3771.

20 See, e.g., Sibbach & Wilson, 312 U.S. 1 (1940); Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444 (1946); Schlagenbauf v. Holder, 379 U.S. 104 (1964).

These misgivings are unwarranted. Even if the Tribunal were perceived as an executive agency, Congressional review of its recommended royalty rate adjustment would appear permissible. As Professor Bernard Schwartz puts the matter, "Legislative approval (by failure to pass a resolution of disapproval) is merely one of the contingencies specified in the governing statute upon which the exercise of the delegated power is to take effect." 21

And so, too, if the Tribunal were perceived as a part of the judicial branch. As noted above, the Supreme Court exercises its rule-making and rule-amending powers subject to Congressional review. Moreover, the Court has been at pains to acknowledge the wisdom and the propriety of these arrangements. In the leading case of Sibbach v. Wilson, Mr. Justice Roberts said, for the Court:

The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose.²²

Present adherence to the practice of Congressional review of judicially proposed rules and amendments is reflected in Public Law 93-595, which was approved by President Ford on January 2, 1975. Section 2(a)(1) of that law adds to Title 28 a new provision—Section 2076—which provides in pertinent part as follows:

The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress, but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so

reported it shall not take effect.

Actually, of course, the Copyright Royalty Tribunal envisaged by H.R. 2223 is not to be a part of the executive branch nor a part of the judicial branch. Pursuant to Section 801(a) of H.R. 2223, the Tribunal is to be "created in the Library of Congress..." The Library of Congress is, of course, an instrumentality of Congress. 2 U.S.C. Chapter Five, passim. And thus the Tribunal, in turn, is to be a subordinate instrument of Congress, assisting Congress in the exercise of its legislative functions. So viewed, H.R. 2223's provisions for Congressional review of Tribunal royalty rate adjustment proceedings are exactly congruent with the statutory provisions under which Congress has reserved power to review and annul enactments of subordinate legislative instrumentalities—the legislatures of the territories—since the beginning of the republic. It is notableand indeed wholly dispositive of the immediate question—that a number of such provisions were expressly cited by the Supreme Court, in a footnote in Sibbach v. Wilson, as "an analogy" supportive of the Congressional review of judicial rule-making there sustained.20

CONCLUSION

It is sub-nitted that the provisions of H.R. 2223 discussed above constitute ufair, orderly and constitutional mechanism for periodic adjustment of royalty rates attendant on a system of compulsory licensing of copyrighted matter. The provisions, both as applied to the new field of cable television and as applied to the old field of musical recordings, would be a distinct—and distinctly constitutional-improvement upon the rigid compulsory-license-with-fixed-royalty statutory model which has been an important feature of the present Copyright Law ever since 1909.

> LOUIS H. POLLAK. 3400 Ohestnut Street, Philadelphia, Pa.

November 11, 1975.

[&]quot;Schwartz, Constitutional Law (1972) p. 140. Cf. Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983 (1975).

"312 U.S. 1, 15 (1941). And see the dissent of Mr. Justice Harlan in Fitzer v. United States Lines Co., 374 U.S. 16 (1963), wherein he chastised his brethern for us. g a case before the Court as a vehicle for mandating a change in he mode of trial of Jones Act and admiralty claims joined in a single proceeding a change the Justice himself though sensible—rather than embodying the change in a proposed amendment to the Admiralty Rules and submitting the proposed amendment to Congress.

"312 U.S. at 15 n. 17. 23 312 U.S. at 15 n. 17.

n/e/r/a

attachment B

NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC. NEW YORK / WASHINGTON / PHILADELPHIA / LOS ÁNGELES

ANALYSIS OF
TELEPROMPTER CORPORATION MEMORANDUM
PROPOSING AMENDMENTS TO SECTIONS
111(d) AND (e) OF H.R. 2223

Prepared for Motion Picture Association of America

by

National Economic Research Associates, Inc.

November 14, 1975

TABLE OF CONTENTS

		Page
	LIST OF TABLES	iii
	OVERVIEW	vii
r,	INTRODUCTION	1
II.	COPYRIGHT QUALIFICATION .	1
III.	COMPONENTS OF THE TELEPROMPTER PROPOSAL	2
īv.	THE REVENUE BASE	3 .
v.	VALUATION OF SIGNALS OR "POPULARITY"	5
VI.	COPYRIGHT FEE IMPACT OF H.R. 2223 ON TELEPROMPTER SYSTEMS	7
VII.	EXEMPTION EFFECT OF TELEPROMPTER PROPOSAL	10
viii.	COPYRIGHT FEE IMPACT OF PROPOSAL ON TELE- PROMPTER SYSTEMS	12
ıx.	COMPARATIVE FEE IMPACT OF H.R. 2223 AND PROPOSAL ON TELEPROMPTER SYSTEMS	14

n/c/r/a

		Page
APPEN	DIX: ANALYSIS OF COPYRIGHT FEE IMPACT OF H.R. 2223 AND TELEPROMPTER PROPOSAL UPON SYSTEMS LOCATED WITHIN THE CONGRESSIONAL DISTRICTS OF MEMBERS OF THE HOUSE JUDICIARY SUBCOMMITTEE ON THE COURTS, CIVIL LIBERTIES, AND THE DMINISTRATION OF JUSTICE	A-1
ı.	COPYRIGHT FEE IMPACT OF H.R. 2223 ON CONGRESSIONAL DISTRICT SYSTEMS	A-l
ıı.	EXEMPTION EFFECT OF PROPOSAL ON CONGRESSIONAL DISTRICT SYSTEMS	A-2
III.	COPYRIGHT FEE IMPACT OF PROPOSAL ON CONGRESSIONAL DISTRICT SYSTEMS	A-3
ÍV.	COMPARATIVE FEE IMPACT OF H.R. 2223 AND PROPOSAL ON CONGRESSIONAL DIS- TRICT SYSTEMS	A-4

LIST OF TABLES

TABLE NUMBER	TITLE
I	PROGRAM EXPENSE AS A PERCENT OF REVENUE FOR ALL TELEVISION STATIONS BY TYPE OF REVENUE
II	SUMMARY COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS PER H.R. 2223 BY REVENUE CLASSIFICATION
II-A	COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS WITH ANNUAL SUBSCRIBER REVENUES NOT MORE THAN \$160,000 PER H.R. 2223
II-B	COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS WITH ANNUAL SUBSCRIBER REVENUES MORE THAN \$160,000 BUT NOT MORE THAN \$320,000 PER H.R. 2223
II-C	COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS WITH ANNUAL SUBSCRIBER REVENUES MORE THAN \$320,000 BUT NOT MORE THAN \$480,000 PER H.R. 2223
II-D	COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS WITH ANNUAL SUBSCRIBER REVENUES MORE THAN \$480,000 BUT NOT MORE THAN \$640,000 PER H.R. 2223
II-E	COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS WITH ANNUAL SUBSCRIBER REVENUES MORE THAN \$640,000 PER H.R. 2223
III	TELEPROMPTER CABLE SYSTEMS COPYRIGHT QUALIFICATION STATUS PER TELEPROMPTER PROPOSAL
III-A	REVENUES OF TELEPROMPTER CABLE SYSTEMS BY COPYRIGHT QUALIFICATION STATUS PER TELEPROMPTER PROPOSAL
IV .	SUMMARY COPYRIGHT FEES FOR LIABLE TELEPROMPTER CABLE SYSTEMS PER TELE- PROMPTER PROPOSAL BY REVENUE CLASSI- FICATION

TABLE NUMBER	TITLE
IV-A	COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS WITH ANNUAL SUBSCRIBER REVENUES NOT MORE THAN \$160,000 PER TELEPROMPTER PROPOSAL
IV-B	COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS WITH ANNUAL SUBSCRIBER REVENUES MORE THAN \$160,000 BUT NOT MORE THAN \$320,000 PER TELEPROMPTER PROPOSAL
IV-C	COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS WITH ANNUAL SUBSCRIBER REVENUES MORE THAN \$320,000 BUT NOT MORE THAN \$480,000 PER TELEPROMPTER PROPOSAL
IV-D	COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS WITH ANNUAL SUBSCRIBER REVENUES MORE THAN \$480,000 BUT NOT MORE THAN \$640,000 PER TELEPROMPTER PROPOSAL
IV-E	COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS WITH ANNUAL SUBSCRIBER REVENUES MORE THAN \$640,000 PER TELEPROMPTER PROPOSAL
v	COMPARISON OF COPYRIGHT FEES FOR TELE- PROMPTER CABLE SYSTEMS PER H.R. 2223 AND TELEPROMPTER PROPOSAL
VI	DISTRIBUTION OF TPT CABLE SYSTEMS WHICH RETRANSMIT "COPYRIGHT QUALIFYING" SIG- NALS BY "POPULARITY" AND BY PROXIMITY TO THE TOP-100 TELEVISION MARKETS
1	SUMMARY COPYRIGHT FEES FOR CABLE SYSTEMS IN SELECTED CONGRESSIONAL DISTRICTS PER H.R. 2223 BY DISTRICT AND REVENUE CLASSIFICATION
1-α	COPYRIGHT FEES FOR CABLE SYSTEMS IN ILLINOIS 19th DISTRICT (HON. TOM RAILSBACK) PER H.R. 2223
1-b	COPYRIGHT FEES FOR CABLE SYSTEMS IN MASSACHUSETTS 4th DISTRICT (HON. ROBERT F. DRINAN) PER H.R. 2223

TABLE NUMBERS	TITLE
1-c	COPYRIGHT FEES FOR CABLE SYSTEMS IN WISCONSIN 2nd DISTRICT (HON. ROBERT KASTENMEIER) PER H.R. 2223
1-d	COPYRIGHT FEES FOR CABLE SYSTEMS IN NEW YORK 29th DISTRICT (HON. EDWARD W. PATTISON) PER H.R. 2223
1-e	COPYRIGHT FEES FOR CABLE SYSTEMS IN CALIFORNIA 39th DISTRICT (HON. CHARLES E. WIGGINS) PER H.R. 2223
1-f	COPYRIGHT FEES FOR CABLE SYSTEMS IN NEW YORK 21st DISTRICT (HON. HERMAN BADILLO) PER H.R. 2223
2 '	SELECTED CONGRESSIONAL DISTRICT CABLE SYSTEMS COPYRIGHT QUALIFICATION STATUS PER TELEPROMPTER PROPOSAL
2-a	REVENUES OF SELECTED CONGRESSIONAL DISTRICT CABLE SYSTEMS BY COPYRIGHT QUALIFICATION STATUS PER TELEPROMPTER PROPOSAL
3	SUMMARY COPYRIGHT FEES FOR LIABLE CON- GRESSIONAL DISTRICT CABLE SYSTEMS PER TELEPROMPTER PROPOSAL BY DISTRICT AND REVENUE CLASSIFICATION
3-a	COPYRIGHT FEES FOR CABLE SYSTEMS IN ILLINOIS 19th DISTRICT (HON. TOM RAILSBACK) PER TELEPROMPTER PROPOSAL
3-b	COPYRIGHT FEES FOR CABLE SYSTEMS IN MASSACHUSETTS 4th DISTRICT (HON. ROBERT F. DRINAN) PER TELEPROMPTER PROPOSAL
3 - c	COPYRIGHT FEES FOR CABLE SYSTEMS IN WISCONSIN 2nd DISTRICT (HON. ROBERT KASTENMEIER) PER TELEPKOMPTER PROPOSAL
3 - đ	COPYRIGHT FEES FOR CABLE SYSTEMS IN NEW YORK 29th DISTRICT (HON. EDWARD W. PATTISON) PER TELEPROMPTER PROPOSAL
3 -e	COPYRIGHT FEES FOR CABLE SYSTEMS IN CALIFORNIA 39th DISTRICT (HON. CHARLES E. WIGGINS) PER TELEPROMPTER PROPOSAL

TABLE NUMBERS

TITLE

3-f

COPYRIGHT FEES FOR CABLE SYSTEMS IN NEW YORK 21st DISTRICT (HON. HERMAN BADILLO) PER TELEPROMPTER PROPOSAL

COMPARISON OF COPYRIGHT FEES FOR SE-LECTED CONGRESSIONAL DISTRICT CABLE SYSTEMS PER H.R. 2223 AND TELEPROMPTER PROPOSAL OVERVIEW

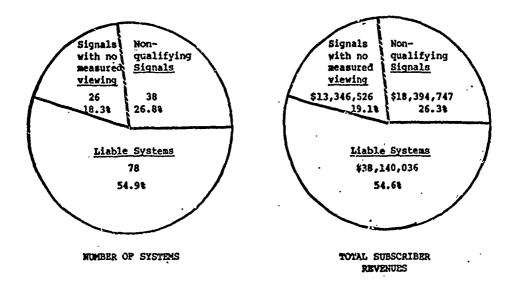
-vii-

OVERVIEW

- 1. The TPT proposal is ambiguous and invites definitional dispute; is internally illogical and perhaps discriminatory; and if implemented, would be an expensive administrative burden.
- a. The language of the proposal employs terms such as "distant signal," "copyright qualifying broadcast station," and "signals...not required to be retransmitted," none of which are straightforwardly applicable, especially within the context of the FCC's complex rules on signal carriage. Even if these terms were precisely defined, the FCC would still have to undertake laborious file-by-file determinations to produce an accurate system-by-system compilation of "copyright qualifying broadcast signals."
- b. The essence of the TPT proposal is that copyright liabilities apply only to "non-network programming of distant stations." (Emphasis added.) Nevertheless, the TPT formula uses as the factor by which cable system revenues are adjusted for copyright purposes, the ratio of non-network program expenses to total broadcast revenues (arriving at a figure of 28 percent) rather than non-network broadcast revenues or non-network revenues net of commissions and discounts. The following table summarizes the relevant ratios, based upon FCC broadcast financial data, that would be calculated using these other measures of revenue.

Type of TV Broadcast Revenue	Ratio of Non-Network Program Expense to Revenue
Total Revenue	28%
Non-Network Revenue	31%
Total Revenue (Net of Com- missions and Discounts)	33%
Non-Network Revenue (Net of Commissions and Discounts)	37\$

- c. The TPT proposal would be complex in application and expensive to administer. The proposal contemplates quarterly certification by the FCC (perhaps at the taxpayer's expense) to the Register of Copyrights of the market share ("popularity") of each "copyright qualifying" station. This would require quarterly determination of the subject stations, measurement of the "popularity" of subject stations from commercially syndicated rating service data (which are published only once each year), and calculation of copyright liability for over 3,200 cable systems. The cost of administering this procedure could amount to a sizable proportion of total copyright fees collected.
- 2. In contrast to the provisions of H.R. 2223, the concepts of "copyright qualification" and "popularity" applied to broadcast signals by the TPT proposal serve to exempt outright substantial numbers of cable systems and their revenues from copyright liability. The following charts show the exemptions resulting from the proposal on TPT's systems (and revenues, in millions of dollars).



- 3. Beyond outright exemption, the "qualification" and "popularity" aspects of the proposal necessarily tend to place a greater copyright burden on systems located in more remote areas compared with systems located in or near major TV markets. Stated another way, the copyright burden would fall more heavily on those systems for which the lack of sufficient "local" signals means greater reliance on "distant signals."
- 4. The TPT proposal impacts in grossly different ways on systems of comparable size. As a result: (a) some systems are exempt because they carry no "copyright qualifying signals"; other systems, although "copyright qualifying" are rendered exempt by reason of insimificant "popularity"; and (b) certain smaller systems, due to their relative remoteness

from major TV arkets, are liable for copyright fees substantially in excess of the nominal levels contemplated in H.R. 2223, and in excess of fees paid by larger systems. As applied to TPT's own systems, the following table illustrates these points:

•	Annual Subscriber			Difference	
System Location	Revenues	H.R. 2223	TPT Proposal	<u> 7ee</u>	Percent
	(1)	(2)	. (3)	· (4)	(5)
Holly Hill, Fla.	\$ 156,816	\$ 784	Exempt	\$ - 784	-100%
Portales, N.H.	155,963	780	\$ 3,057	+2,277	+291
Milpitas, Calif.	259,182	1,792	Exempt	-1,797	-100
Iron Hountain, Mich.	255,240	1,752	15,008	+13,256	+757
Mawaii Kai, Hawaii	344,148	2,762	Exempt	-2,762	-100
Sault Ste. Marie, Mich.	336,204	2,643	17,886	+15,243	+577
W. Pálm Beach, Fla.	614.671	7,493	Exempt	-7,463	- 100
Pocatello, Idaho	632,848	7,857	21,204	+13,407	+171
New York, N.Y.	5,917,320	139,933	Exempt	-139,933	~100
Elmira, W.Y.	\$1,633,437	\$ 32,836	\$59,457	\$ +26,621	+81%

Another effect of TPT's proposal is that it tends to increase payments by the decreased number of systems which remain liable for payment, with a proportionately greater burden borne by systems in the lower revenue classes.

	H.R.	H.R. 2223		TPT Proposal		Percent Difference	
Revanue Classification	Number of Systems	Copyright Fee	Mumber of Systems	Copyright Pee	Number of Systems	Copyright Fee	
•	(2)	(2)	(3)	(4)	(5)	(6)	
Annual Subscriber Revenues Not More Than \$160,000	41	¢ <u>1</u> 5,996	17	\$ 22,61,7	-59 <u>}</u>	+414	
Annual Subscriber Revenues Fore Than \$160,000 But Not More Than \$320,000	'Ď	52,734	19	113,908	-42	+1116	
Annual Subscriber Revenues More Than \$320,000 But Not More Than \$480,000	18	59,323	13	85,740	-28	· +45	
Annual Eubscriber Revenues Hore Than \$480,000 But Not Hore Than \$640,000	17	110,619	,	133,064	-47	+20	
Annual Subscriber Revenues More Than \$640,000	33	794,102	20	541,052	-39	32	
Total	142	\$1,032,774	78	\$896,381	-451	-131	

To summarize the table: The TPT proposal, as applied to its systems, results in an overall reduction in copyright fees of \$136,393, or 13 percent from \$1,032,77% to \$895,381 relative to H.R. 2223. Only the highest revenue class of systems—those with annual revenues in excess of \$640,000—show a decrease in fees. All other revenue classes of systems show increases.

Viewed from a slightly different perspective, the following table presents the percentage distribution of copyright fee payments by revenue class under H.R. 2223 and the TPT proposal respectively. Among other things, it shows that the relative contribution of the largest revenue class is

reduced from 77 percent to 60 percent of total copyright fee payments under the TPT proposal, while the relative contribution of the remainder increases from 23 percent to 40 percent.

COMPARISON OF COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS PER H.R. 2223 AND TELEPROMPTER PROPOSAL

	Copyrigh	t Fees	Copyright Fees As A Percent of Total		
Revenue Classification	Per H.R. 2223	Per TPT	Per H.R. 2223	Per TPT	
•	(1)	(2)	(3)	(4)	
Annual Subscriber Revenues' Not Hore Than \$160,000	15,996	\$ 22,617	1.551	2.52	
Annual Subscriber Revenues More Than \$160,000 But Not More Than \$320,000	52,734	113,908	5.11	12.71	
Annual Subscriber Revenues More Than \$320,000 But Not More Than \$480,000	59,323	85,740	5.74	9.57	
Annual Subscriber Ravenues More Than \$480,000 But Not More Than \$640,000	110,619	133,064	10.71	14.84	
Subtotal	238,672	355,329	23.11	39:64	
Annual Subscriber Revenues More Than \$640,000	794,102	541,052	76.89	60.36	
Total			100.00	100.00	

-xiii-

I. INTRODUCTION

The purpose of this study is twofold: (1) to evaluate the conceptual and administrative soundness of the Tele-PrompTer (TPT) proposal as an appropriate alternative to the provisions of H.R. 2223 for determining copyright liability among cable systems for the retransmission of copyrighted broadcast signals and (2) to evaluate the specific impact of the proposal with respect to copyright liability on (a) TPT cable systems for which relevant base data are publicly available and (b) copyright proprietors. Additionally, in an appendix to this study, we present an analysis of the impact of the TPT proposal upon systems located within the Congressional Districts of the members of the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice.

II. COPYRIGHT QUALIFICATION

As a preamble to its proposal TPT states its "basic position is that there should be no copyright liability of any sort for cable retransmission of broadcast signals." However, in what it characterizes as a compromise, the TPT proposal does make some provision for copyright liability. The proposal is based fundamentally on distinctions it draws among local signals and network and non-network distant signals, and concludes that only the last, non-network distant signals should be subject to copyright liability. The specific language of TPT's redraft of the statute reads "a 'copyright

qualifying broadcast station' shall be any broadcast station whose signal is not required to be retransmitted by the cable system pursuant to the rules and regulations of the [FCC]." Stated another way, the TPT proposal would grant copyright liability only for non-local broadcast stations (i.e., those which may not insist upon retransmission of their signals), and then only the non-network originated portions of the signals of such stations. It should be noted here that the terms "distant signal," "copyright qualifying broadcast station" and "signal(s)...not required to be retransmitted" are not terms of art which lend themselves to precise definition, especially within the context of the FCC's complex rules on signal carriage for different types of stations for various purposes. They are, rather, terms which are ambiguous and which invite definitional disputation. This ambiguity is characteristic of the whole TPT proposal, but specifically of its formula for determining copyright liability. Without otherwise commenting here on the philosophy, equity or realism of the proposal, it would appear at best to be an enormous administrative burden.

III. COMPONENTS OF THE TELEPROMPTER PROPOSAL

The critical substance of the TPT proposal is that only "non-network programming of distant stations" be subject to copyright liability. The proposal attempts to establish a marketplace rationale for this position (based on a "model of the broadcasters") by focusing on:

- the percentage of total cable revenues that should be available for copyright payments, and
- 2. the value of each distant signal for copyright purposes.

To place the TPT proposal in perspective we shall examine its specific components point by point. Cable system copyright liability is determined by application of the formula:

or as stated illustratively in the TPT proposal:

(A) (B) (C) (D) (E) (D)
$$\div$$
 (A) (\$500,000) X (28%) X (8%) = \$11,200 2.24%

IV. THE REVENUE BASE

The product of the first two components (A) x (B) of the TPT formula defines the base of cable system revenues that would be subject to copyright liability. The TPT proposal adjusts total cable system revenues by a factor which is the ratio of "programming costs" (in reality, non-network programming costs) to "total revenues" of "all television stations" (28 percent in this hypothetical example). Our

examination of FCC data for 1974 indicates that the 28 percent figure is almost certainly low and its basis open to question. Since the main thrust of the TPT proposal is imposition of copyright liability only on non-network distant signals, at the very least a more logical figure would be 31 percent, the ratio of non-network program expense to non-network total broadcast revenues. Indeed, it would appear perhaps even more appropriate to use a figure of 37 percent, based on non-network net broadcast revenues, which adjusts for various commissions and cash discounts. Clearly, these alternatives to TPT's 28 percent would yield greater copyright liability. The relevant FCC data are summarized in Table I.

A final comment is appropriate on this point. The TPT proposal characterizes its use of the program expense/
revenue ratio as "extremely generous" given broadcasters' use of scarce spectrum space "at no cost to them." To be sure, there may be some merit to TPT's position, insofar as broadcasters ordinarily are not charged directly for allocated channels. Nevertheless, TPT apparently overlooks the not inconsiderable effort and expense required to ascertain community needs and interests, maintain public records, monitor compliance with the fairness and equal time provisions of FCC rules and regulations, etc., pursuant to the continued grant of a license to operate on an allocated channel. In addition, without presuming to speak for the broadcasters on this issue, examination of FCC data for 1974 shows that the cable industry

currently has available for use programming valued at \$736 million at the TV station level, and \$1.884 billion¹ for the whole broadcast industry (including networks). The bulk of this programming is retransmitted by the cable industry "at no cost to them.

VALUATION OF SIGNALS OR "POPULARITY"

The (C) component of TPT's formula attempts a valuation of the "copyright qualifying" distant signals used by cable systems. TPT uses 8 percent in its illustration. The device employed by the TPT proposal is a "popularity" measurement of the signals. This "popularity" measurement would be applicable to the county or counties in which cable systems are located, "expressed as a market share percentage." stated in TPT's redraft of the statute, "the 'market share' of each 'copyright qualifying broadcast station'...shall be derived by...dividing the total number of viewer hours credited to the ... station with respect to the county ... in which the cable system is located by the total number of viewer hours credited to all stations...in such county.... Since TPT uses the "popularity" of copyright qualifying signals in its determination of cable system copyright liability, it appears inconsistent to measure that "popularity" in "total

Network 1974 program expenses were \$1.148 billion. (Federal Communications Commission, <u>Public Notice No. 5445</u>, September 8, 1975, "TV Broadcast Financial Data--1974," Table 6.)

county" households rather than "popularity" in CATV households only. The use of TPT's measure of "popularity" could tend to understate "popularity" among cable viewers and, thus, to understate the system's copyright liability.

Although TPT's contention that these data are now being collected by the national rating services is technically correct, their application would represent a substantial administrative burden. TPT's draft statute contemplates FCC certification of the market share of each "copyright qualifying broadcast station" to the Register of Copyrights each quarter. This presupposes an unambiguous determination of such stations as well as identification of the appropriate percentage of "copyright qualifying" non-network programming included in the signals of otherwise copyright-exempt stations. The rigorous application of the appropriate rating service data clearly would constitute an immense undertaking; indeed, the mere determination of "qualifying" stations/ signals required four times each year would itself be administratively burdenso. ...

The ultimate effect of TPT's proposal is very clear. By definition, the proposal seeks to narrow substantially the base of TPT systems (and revenues) which are subject to copyright liability by exempting certain systems entirely and the bulk of revenues of many other systems. This approach is in sharp contrast to the fee schedule currently incorporated in H.R. 2223, which applies copyright liability

to the full base of the cable industry's basic service revenues, and which is structured incrementally to impact more heavily on the larger systems.

Before turning to an examination of the TPT proposal in application to its systems, it is appropriate to review the effect of the H.R. 2223 fee schedule on TPT cable systems.

VI. COPYRIGHT FEE IMPACT OF H.R. 2223 ON TELEPROMPTER SYSTEMS

Tables II through II-E present observations on 142 TPT cable television systems² for which data on subscribers and monthly subscriber fees are published. The tables array the cable systems by annual revenue classification as determined by the fee schedule in H.R. 2223. The cable systems in each of the five resulting revenue classifications are presented in Tables II-A through II-E. Table II presents a summary of the five classifications. Examination of Column (6) shows that copyright liability for TPT's systems under the provisions of H.R. 2223 ranges from an effective rate of 0.50 percent for the smaller systems in the lowest revenue classification to 1.88 percent for the larger systems in the highest revenue classification. These rates are equivalent to 2.6 cents and 11.2 cents per subscriber per month, respectively [Column (7)]. The effective rate for all 142 TPT cable systems in all revenue classifications results in an overall

Including those in which TPT has an interest of at least 50 percent.

copyright liability of 1.48 percent of annual revenues, or 8.6 cents per subscriber per month (less than the postage cost of billing each subscriber for service each month).

It should also be noted that the purposefully incremental construction of the H.R. 2223 fee schedule results in a greater than proportional share of copyright liability being borne by the largest TPT systems--those with annual revenues in excess of \$640,000, and with the highest average monthly charge to subscribers--\$5.98 [Column (4)]. Columns (3) and (5) indicate that these systems, representing 60.6 percent of TPT's revenues, account for 76.9 percent of the total copyright liability. A less than proportional share applies to all other classes of TPT's sytems. This result is consistent with the intention of the H.R. 2223 statute as drafted. It is also significant to note that the overall copyright fee impact of 1.48 percent on TPT systems per H.R. 2223 contrasts sharply with the illustrative figure of 2.24 percent in the text of TPT's proposal. Despite the higher illustrative fee given in the text of the TPT proposal (2.24 percent versus 1.48 percent in H.R. 2223), one is led to conclude that there are elements in the TPT proposal, which if placed in actual operation would result in substantially lower copyright liability for TPT. Since the formula would apply only to systems which retransmit "copyright qualifying" stations and/or signals, the definition serves to exempt outright a number of cable systems from all copyright liability.

It should also be noted that, beyond outright exemption, the concepts of "copyright qualification" and "popularity" embodied in the TPT proposal necessarily result in an uneven geographic distribution of copyright liability. This would tend to place a greater copyright burden on cable systems located in more remote areas which rely heavily on "distant signal" importation rather than on systems located in or near major TV markets which, because of the availability of many local signals, use fewer "distant signals" in providing service to their subscribers. The greater copyright burden, therefore, would fall more on those systems for which the lack of sufficient "local" signals means greater reliance on "distant signals."

analysis of the geographic distribution of those systems which retransmit the signals of "copyright qualifying" TV stations, as defined by the TPT proposal. The data contained therein show that of the 25 systems within 35 miles of a top 100 TV market, only 2 systems, or 8 percent, relied on distant signals with "popularity" factors of 4 percent or more.

Conversely, of the 79 systems outside the 35 mile zones of top 100 TV markets, 51 systems, or 65 percent, relied on "copyright qualifying distant signals" with relatively high "popularity" ratings. This pattern of signal carriage by cable systems underscores the greater copyright burden of systems outside major markets.

The consistency of this pattern is further underscored by the observation that of the 26 "copyright qualifying" cable systems with minimal viewing to distant signals, 16 systems, or 62 percent, are within the 35 mile zone of a top 100 TV market. This indicates that closer proximity to a major TV market results in less reliance on "copyright liable" distant signals.

Moreover, in addition to the 104 TPT "copyright qualifying" systems in the foregoing analysis, the same pattern of signal carriage is evident among the 38 TPT systems, which are exempt outright from copyright liability. Of these 38 systems, 30 systems, or 79 percent, are within 35 miles of a top 100 TV market. Again, a pattern wholly consistent with their nonreliance on "copyright qualifying" distant signals.

VII. EXEMPTION EFFECT OF TELEPROMPTER PROPOSAL

In order to evaluate the exemption aspects of the TPT proposal, we have established a definition of the term "copyright qualifying broadcast signal" and, by extension, "qualifying" cable systems. For purposes of this analysis, we have defined such systems as those which retransmit signals of stations whose Grade B contours do not cover the location of the cable system. Therefore, "non-copyright qualifying" cable systems are those which retransmit only the signals of stations within whose Grade B coverage the system is located,

plus other "significantly viewed" signals in the county in which the system is located. Although we are mindful that these definitions lack absolute precision, they should yield results which are reasonably representative of the impact of TPT's proposal on their systems.

The results of applying these definitions to the 142 TPT cable systems included in our analysis are found in Tables III and III-A which are, respectively, summaries of cable systems and system revenues as to copyright qualification.

Examination of the data in these tables indicates that if the exemption aspects of the TPT proposal were to be implemented, 38 of its systems, or 26.8 percent would be exempt outright from all copyright liability. More to the point is that these systems account for and exempt 26.3 percent of TPT's revenues from all copyright liability. Beyond outright exemption, also consider the impact of the "popularity" component of the TPT proposal on copyright qualification. Although we have already commented on the unwieldy aspects of the "popularity" component, we have, nevertheless, undertaken the viewing hour

As defined and listed in Appendix B of the Memorandum Opinion and Order on Reconsideration of the Cable Television
Report and Order (Docket 18397 et al.), FCC 72-530. It
should be noted that Appendix B is based upon 1971-1972
viewing data, and, hence, may not reflect current patterns
of significant viewing.

Furthermore, the application of these definitions to the data is not completely unambiguous, e.g., the proper distribution of subscribers of systems located in more than one county.

market share analysis in conformity with our interpretation of the TPT proposal. The analysis focuses on "copyright qualifying" cable systems [Column (3), Table III], and identifies [in Column (4)] those cable systems which carry "qualifying" signals which achieve "popularity" below 0.5 percent⁵ in the county in which the cable system is located. The effect is to exempt another 26 systems, an additional 18.3 percent, from copyright liability and an additional 19.1 percent of TPT's. revenues [Column (4), Table III-A]. Taken together, our estimate of the implementation of the proposal would exempt: 64 TPT systems (45.1 percent) and \$31.7 million of TPT revenues (45.4 percent) from copyright liability. Note that of the \$31.7 million of revenues exempt from copyright liability, \$20.0 million, or 62.9 percent, are accounted for by TPT systems in the highest (over \$640,000) revenue class. Column (6) of Tables III and III-A recapitulate the exemption totals.

VIII. COPYRIGHT FEE IMPACT OF PROPOSAL ON TELEPROMPTER SYSTEMS

To the 78 TPT systems that would remain liable for copyright payments we have applied the formula from the TPT proposal to determine copyright liability. The formula we have used includes the program expense/broadcast revenue

The minimum reporting standard of the Arbitron television rating service is 0.5 percent.

factor of 28 percent (see Table I), and "popularity" factors as defined in the TPT proposal. We have employed the term "copyright qualifying" broadcast signals as defined on page 10. Application of the formula with these components to the remaining 78 "copyright qualifying" systems results in a copyright liability of 2.35 percent of the revenues of the subject systems, or 13.2 cents per subscriber per month. These data are presented in summary form by system revenue classification in Table IV. Examination of the data in Columns (5) and (6) indicates that copyright liability impacts unevenly according to revenue classification. In some cases copyright liability falls with greater impact on lower revenue classes. For example, the greatest impact is on TPT systems in the \$160,000-\$320,000 annual revenue class, an effective rate of 2.61 percent of revenues, or 14.9 cents per subscriber per month, as compared with impacts of 2.42 percent and 13.4 cents per subscriber per month for the largest TPT systems -- those in the over \$640,000 annual revenue class. Copyright liability is determined system by system and is a function of the

Note that the 28 percent figure is based on total broadcast revenues which has the effect of reducing copyright payments.

⁷ To give proper weight to copyright qualifying non-network programming of network affiliated stations, we have applied a factor of 40 percent to the market share percentage of viewing hours obtain 1 by such stations. Estimate is based on A. C. Nielsen (, Nielsen National TV Ratings, NTI Nielsen Television Index, which was provided by an MPAA member firm.

"copyright qualification" and "popularity" aspects of the proposal. These features of the proposal also suggest that the geographic location of cable systems would be an important determinant of the degree to which they would be liable for copyright payments. As noted above, the impact of TPT's proposal is likely to fall most heavily upon those systems which, due to the unavailability of local signals, necessarily will depend more heavily upon the carriage of distant signals. (See Table VI.) Tables IV-A through IV-E present the data for individual TPT systems in each of the five revenue classifications.

IX. COMPARATIVE FEE IMPACT OF H.R. 2223 AND PROPOSAL ON TELEPROMPTER SYSTEMS

right liability under the provisions of H.R. 2223 and the TPT proposal. This brings together the data from Tables II and IV in summary fashion. As indicated therein, the real significance of the TPT proposal lies in comparing its effects on the various revenue classifications of systems. For the 142 systems under the H.R. 2223 fee schedule, the copyright fee impact is 1.48 percent, or 8.6 cents per subscriber per month. The comparable figures for the 78 systems liable for copyright fees under the TPT proposal are 2.35 percent and 13.2 cents. Reviewing the data for each revenue classification indicates higher fee impact under the TPT proposal for systems in all revenue classes which remain liable (but somewhat higher

impact on systems in the lower revenue classes). For the 17 liable systems in the under \$160,000 annual revenue class; the fee figures are 1.82 percent of revenues and 10.2 cents per subscriber per month under the TPT proposal, as compared with 0.50 percent and 2.6 cents per subscriber per month under H.R. 2223. This pattern persists in all intermediate revenue classes. The smallest relative difference occurs in the largest systems with annual revenues in excess of \$640,000. The comparable figures for this class of TPT systems is 1.88 percent and 11.2 cents under H.R. 2223 and 2.42 percent and 13.4 cents under the TPT proposal. (It is also significant to note that all revenue classes of systems, other than the highest, experience net increases in absolute dollar liability, despite a substantial reduction in the number of systems liable for payment under the TPT proposal. For example, the data in Tables II and IV indicate that in all revenue classes under \$640,000, 109 TPT systems have a liability of \$238,672, an average of \$2,190 per system under H.R. 2223. Under TPT's proposal, 58 systems which remain liable bear a liability of \$355,329, an average of \$6,126 per system. The only reduction in absolute dollar liability occurs in the over \$640,000 revenue class, and the difference is over \$250,000 in fees as compared with H.R. 2223.)

Table V also presents what would appear to be the "bottom line" of the TPT proposal, which is total copyright fees for TPT systems liable under the proposal (a) as a

percentage of total TPT system subscriber revenues, and (b) per subscriber per month. What emerges is an effective rate for all systems of 1.28 percent and 7.5 cents per subscriber per month under the proposal versus 1.48 percent and 8.6 cents per subscriber per month under H.R. 2223. Again, all revenue classes of systems, other than the largest group, experience higher effective rates under the proposal than those which result under H.R. 2223. Only the largest systems experience a net reduction in effective rates under the proposal, from 1.88 percent and 11.2 cents per subscriber per month to 1.28 percent and 7.6 cents per subscriber per month.

TABLE I

PROGRAM EXPENSE AS A PERCENT OF REVENUE FOR ALL TELEVISION STATIONS BY TYPE OF REVENUE

Line	Type of Revenue	Revenue -(Million	Program Expense Dollars) (2)	Program Expense As a Percent of Revenue (2) ÷ (1)
1	Total Broadcast	\$2,631	\$736	28%
2	Total Broadcast (Non-Network)	2,383 ²	736	31
3	Net Broadcast1	2,230	736	33
4	Net Broadcast (Non-Network)	1,9823	736	37

¹Total Broadcast Revenue less commissions to agencies, representatives and brokers and less cash discounts. ²Derived from Total Broadcast Revenue less sale of station time to networks. ³Derived from Net Broadcast Revenue less sale of station time to networks.

Source: Federal Communications Commission, Public Notice No. 54455, September 8, 1975, TV Broadcast Financial Data--1974, Table 5.

Mote: Detail may not add to total dut to rounding.

Source: Tables II-A through II-E.

SUPUANY COPYRIGHT FEES FOR TELEMONPERS CABLE SYSTEMS PER N.H., 2223
BY REVENUE CLASSIFICATION

Copyright Fee por Subscriber Per worth (5)+(1)+12	*. 026	.03	. 053	700	·	\$.086
Copyright Tee as a Percent of Subscriber Revenues (5)+(3)	\$ °0	. 62	6.87	1.15	1.0	1.1
Copyright Fee per H.R. 2223 (5)	\$ 15,996 (1.58)	52,734	(5.74)	110,619	794,102 (76.91)	(100.00)
Revenue Per Subscriber Per Month (3) o (1) + 12 (4)	\$5. 25.	\$ \$	6 9	. .	5.98	18.81
Annal Subscriber Revenues (3)	\$ 3,199,819 (4.61)	7,913,468	6,834,874 (3.8%)	9,610,967	42,322,181	(100.00)
Average Number of Subscribers Per System (2)	1,238	3,538	3,366	8,710	17,869	7,035
Number of Subscribers (1)	50,749 (5,10)	116,746	96,579 (9.61)	148,075 \$	589,666	(100.00)
Mavenue Classification and Number, of Systems	Arnual Subacriber Revenues Not Force than \$150,000 41 Systems (Percent of Total) Annual Subacriber Revenues	Note 77-15 September 1970, 000 Note 1970 Note	Action 2 State Revenues French Revenues Franch Revenues Franch Revenues 18 Systems (Fercent of Total) Action Subjectible Revenues Franch Re	Note in State in Section inc. No. viet from Section 17 Systems (Percent of fotal) Ament School fotal)	31 Systems (Percent of Total)	142 Total Systems (Percent of Total)

KYDIOEE	Copyright Free Ser Subseriber Per Henth (3) (1) 12		\$.926
	Copyright Pro as a Process of Bulberriber Beronses (3) (3) (4)		105.8
TO TO THE TOTAL TOTAL TO THE TO	Copycight Fee per R.R. 2223.		\$15,996
CONTICUT TEES FOR PELEPROPETER CALLE STITUME WITH AMBULL NOT HOME TEAM \$150,000 NOT ME. R. R. 2223	Annal Beberibe Revenue		637661768
	Machor of Relectibets (1)		36,749
8734	क्षांतच्या कार्यस्य	Mail Canyon, Califf. II Sequatedo, Califf. Fieddook, Califf. Milita, Califf. Milita, Califf. Month Sequate Month Sequate Month Sequate Milita, Califf. Month Sequate Month Sequate Month Sequate Find Sequate Month Sequate Find Sequate Militation Mi	1017

*Indicates system which lies within a 15-mile radius of a Top-180 televisien methet.

betes Teleprompfer Cable Systems include CATV systems in which Teleprompfer has an interest of at lasst 50 percent.

Derived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 11.

Tassed on unrounded compright (es. This system poets two monthly subscription rates; these data reflect the lower rate. This system poets two monthly subscription rates; these data reflect the lower rate. Source: Cols. (1)-(2): Talayasico Diservices Follows: Talayasico Diservices (1)-(3): Derived from fee schedule in R.R. 2111.

COPTRIGHT PEES FOR TELEPROPER CONTRICT PRINTS AND STREET REVENUES WORE THAN \$150,000 BUT NOT BOOK \$150,000 PER N.N. 2223

System Location	Number of Subscribers (1)	Annual Subscriber Revenues	Copyright Rep por R.R. 2223 (3)	Copyright Yee as a Percent of Subscriber Revenues (3) + (2) (4)	Copyright Yee per Subscriber Per Month (3) : (1) : 12 (5)
Beverly Hills, Calif. Ft. Bregg, Calif. Kilphess, Calif. Noverk, Calif.	0,000 8,000 1,000	231,960 202,260 259,182 196,666	# 11111 10000 1000	90000	
U U R	24808 24808 24808	20004	11221	94.000	4600
Uddah, Calif.* Nest Hollywood, Calif.* Trinicad, Colo.* Lake Motth, Fla. Riviera Beach, Fla.	4,226 3,571 3,287 3,090	254,731 235,685 254,351 269,502	1,444 1,450 1,454 1,454	00000 84666	
St. Peteraburg, Fla. * St. Peteraburg, Fla. * Nock Island, Ill. * Leaville, La. Midawaka, Maine	20 4 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9	2112,533 281,226 251,658 182,658	111211 121011 121011 121011 131011	00000000000000000000000000000000000000	00000
Caluact, Mich. Iron Pountain, Mich. Brainerd, Min. Brainerdsh, Wont. Lovington, N.M. Silver City, M.M.	ww.41/4 0.044/50 40.04/84	255,240 255,240 217,698 187,900 220,169	444444 64464 64464 64464 64464	000000	000000 uququa uququa
Oswego, N.Y.* Greenwood, S.C.* Commerce, Tw. Creha, Tax. Grundy, Va. Stattle, Va. Seattle, Myo.	44WWWWWW 44WWWWWWWW 44WWWWWWWWW 64WWWWWWWWWW	2008 2359 2359 2359 2359 2359 2359 2359 2359	74 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4	40000000 400000000	2000000000 200000000000000000000000000
fotal	116,746	87,913,468	. \$52,734	0.678	\$.03

"Indicates system which lies within a 35-mile radius of a Top-100 talevision market.
Note: Talercapter Cable Systems include CATV systems in which
TelePrompter has an interest of at least 50 percent.

Darived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 12.

This system posts two monthly subscription rates; thase data reflect the lower rate.

Source: Cols. (1)-(2): Talevision Digest, Inc., Television Patthook, 1976-1975

Zatthon/No. 44, Services Volumes.

Col. (3): Derived from fee schedule in N.R. 2223.

COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS WITH ANNUAL SUBSCRIBER REVENUES MORE THAN \$480,000 PER H.R. 2223

Copyright Fee per Subscriber Per Month	(3) +(1) +12 (5)	6. 1000 0000 0000 0000 0000 0000 0000 00	\$.051
Copyright Fee as a Percent of Subscriber Revenues	(3) † (2) (4)	0.000000000000000000000000000000000000	9£8*0
Copyright Fee per H.R. 2223	(3)	4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4	\$59,325
Annual Subscriber Revenues ¹	(2)	424,398 321,660 331,660 341,260 344,520 344,520 344,148 344,148 344,148 344,348 445,348 445,348 445,348	\$6,834,874
Number of Subscribers	(3)	2 4 4 6 6 4 6 6 6 6 6 6 6 6 6 6 6 6 6 6	96,579
System Location	,	Frescott, Ariz. Kings Beach, Calif. Los Gatos, Calif.* Ontario, Calif.* Simi, Calif.* Yucas Valley, Calif. Hillsborough County, Pla.* Hawaii Kai, Hawaii Liberal, Kan. Caribou, Maine Escanaba, Mich. Ironwood, Mich. Ironwood, Mich. Ironwood, Mich. Islispell, Mont. Keene, N.H. Islispell, Mont. Relispell, Mont. Relispell, Mont. Relispell, Mash.	Total

*Indicates system which lies within a 35-mile racius of a Top-100 television market.

dote: TelePrompTer Cable Systems include CATV systems in which TelePrompTer has an interest of at least 50 percent.

Derived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 12.

Source: Cols. (1)-(2): Television Digest, Inc., Television Factbook, 1974-1975 Edition/No. 44, Services Volume.

Col. (3): Derived from fee schedule in H.R. 2223.

TABLE II-D

COPYRIGHT FEES FOR YELEPROMPTER CABLE SYSTEMS WITH ANNUAL SUBSCRIBER REVENUES MORE THAN \$480,000 BUT NOT MORE THAN \$640,000 PER H.R. 2223

Copyright Fee per Subscriber per Month	(3) +(1) +12 (5)	**************************************	
Copyright Fee as a Percent of Subscriber Revenues	(3) ÷ (2) (4)		
Copyright Fee per H.R. 2223	(3)	5,585 7,493 7,493 7,18379 7,2270 6,233 6,931 6,902 6,902 6,902 6,902	
Annual Subscriber Revenues	(2)	\$ 519,246 511,714 614,671 518,886 618,	
Number of Subscribers	(1)	0,657 10,706 10,348 10,634 10,629 10,570 10,	
System Location	,	Dothon, Ala. San Bernadino, Calif.* West Palm Beach, Fla. Lewiston, Ida. Pocatello, Ida. Worcester, Mass.* Winona, Minn. Ventnor, N.J. Ventnor, N.J. Ventnor, N.J. Ilion, N.Y. Farmingfon, N.W. Farmingfon, Wash. Woltch?, Wash. Worltch?, Wash. Farmont, W. Va.	

*Indicates system which lies within a 35-mile radius of a Top-100 television market.
Note: TelePrompTer Cable Systems include CATV systems in which
TelePrompTer has an interest of at least 50 percent.

Derived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 12.
Data for this system are based on the number of winter subscribers.

Source: Cols. (1)-(2): Television Digest, Inc., <u>Television Sactbook</u>, 1974-1975

Edition/No. 44, Services Volume.

Col. (3): Derived from fee schedule in H.R. 2223.

	NEV TON		
	SUBSCRIBER		
COPTAIGHT PEES FOR	ABLE SYSTEMS WITH AMMUAL	MORE TRAN \$640,000	PER M.R. 2223
	TELEPHONOTER C		

Copyright Fre per Buscather Per honth (3)+(1)+12 (5)	12446664664646646664646464646	
Copyright Fee as a Percent of Subscriber Revenus. (3) + (2) (4)	44444444444444444444444444444444444444	
Copyright For par M.R. 2223 (3)	######################################	
Annual Bubscriber Revenues!	### ### ##############################	
Municer of Audecriders (1)	######################################	
water together	Florence, Ala. Gudaten, Ala. Gudaten, Ala. Gudaten, Ala. Tuscalocat, Ala. Santa Glate, Calif. Santa Mana, Calif. Santa Mana, Calif. Santa Mana, Mana, Mana, Calif. Santa, Mil.	

*Indicates system which lies within a 15-mile redius of a Top-100 television mather. Mote: TeleTrompTer Cable systems include.CATV systems in which TeleTrompTer has an interest of at least 50 percent.

* Pariwed:BywantiblyInd of subscribers by 12.

* Tate and the number of subscribers by 12.

* Data for this system are based on the number of winter, subscribers.

Source: Cols. (1)-(2): Television Digest, Inc., Television Tertbook, 1974-1975 Edition/No. 44, Services Volume. • Col. (3): Derived from fee achedule in N.R. 2223.

n/c/r/a

TELEPPEMPTER CABLE SYSTEMS COPYRIGHT OUALIFICATION STATUS PER TELEPHOMPTER PROPOSAL

				Pumber of	Systems With:		
Line	Revenue Classification	Totc1 Systems (2)+(3) (1)	Mon-Copyright Qualifying Broadcast Signals!	Coryright Qualifying Broadcast Signals ² (4)+(5) (3)	Copyright- Qualifying Broadcast Signals with Ho Measured Viewing!	Copyright Qualifying Broadcast Signals with Neasured Viewing*	Exemptions from Copyright Linbility (2)+(4) (6)
1	Annual Subscriber Revenues Not More Than \$160,000	41	19	22	5 .	17	24
2	Annual Subscriber Revenues More Than:8160,000 But Mot More Than \$320,000	33	7'	26	7	19	14
3	Annual Subscriber Revenues Hore Than \$320,000 But Hot More Than \$480,000	18		14		23	5
4	Annual Subscriber Revenues Mors Than \$480,000 Sut Not More Than \$640,000	17		13	4	,	
5	Annual Subscriber Revenues Hore Than \$640,000	33	.4	29	•	20	13
•	Total	142	22	104	25	28	ŧŧ
		*******		Percen	t of Systems		
7	Annual Subscriber Revenues Not More Than \$150,000	100.00	46.31	53.71	12.28	41.54	58.51
•	Annual Subscriber Revenues More Than \$160,000 But Mot Muce Than \$320,000	100.03	21:2	74,8,	 21.2	57.6	42.4
•	Annual Subscriber Revenues More Than \$120,000 But Not More Than \$480,000	100.00	22.2	77.8	5.6	72.2	27.8
10	Annual Subscriber Revenues More Than \$480,000 But Not More Than \$640,000	100.00	23.5	76.5	23.5	52.9	47.1
11	Annual Subscriber Revenues Note Than \$640,000	100.01	. 13.1	67.9	27.3	60.6	39.4
12	Total '	190,6%	26,8	• 15.2	18.5	54.9	45.1

Note: Detail may not add to total due to rounding.

Source: Cole. (1)-(3): Television Dipent, Inc., volcyinion Pacthonk,
1974-1975 Dittien/No. 44, hervices and Stations
Volumes; CATV and Warfon Coverno Atlas, 1975.
Cole. (4)-(5): American Russich Bursau, Arbitim Infovinion 1974
County Coversolo.

n/c/r/a

Includes those systems which retransait only broadcast signals which are required to be retransmitted pursuant to PCC rules and regulations. [Those systems which retransait the signals of stations within whose Grade S contour the system is located, plus other "significantly viewed" signals in the courty in which the system is located, plus other "significantly viewed" signals in the courty in which the system is located, plus other "significantly viewed" signals in the courty involved those systems which retransait money produces talgonis which are not required to be retransait the pursuant to PCC rules and fayolations, including those systems which retransait "copyright qualitying" broadcast signals which he not section is a large of at least 0.51. The minimum reporting standard of the Arbitron television rating service is 0.51. "Includen those systems which retransait "copyright qualitying" broadcast signals which he achieve, "popularity" of at least 0.52. The minimum reporting standard of the Arbitron television rating service is 0.53.

TABLE III-A

REVIEWES OF TELEPROMPTER CABLE SYSTEMS BY COPYRIGHT (UNCLIFICATION STATUS PER TELEPROMPTER PROPOSAL

				-			
				Bevenues O	f Systems With:		
				ACCOUNT OF	Copyright	Copyelight	
					Qualitying	Qualifying	
			Mon-Copyelght	Copyright	Broadcast	Broadcast	Exceptions
			Qualifying	Qualitying	Signals with	Signals with	(ICE
	Revenue	Total	Broadcast	Broadcast	No Moasured	Keazured	Copyright
Line	Classification	Systems	Signala	Signala	Viewing'	Alemina,	Liability
21116	21244111031103	121+131		-(4)+(5)-			(शनुका
		(1)	(2)	(3)	(4)	(5)	(6)
1	Annual Subscriber Revenues						
•	Not More Than \$160,000	\$3,199,819	\$1,498,705	\$1,701,114	\$460,174	\$1,240,940	\$1,958,479
2	Annual Subscriber Revenues More Than \$160,000 But						
	Not Mote Than \$320,000	7,913,468	1,794,875	6,118,593	1,757,787	4,260,406	3,552,662
3	Annual Subscriber Revenues						
-	More Than \$320,000 But			5,428,758	361,260	5,067,498	1,767,376
	Not More Than 3480,000	6,834,874	1,406,116	3,410,730	341,440	3,007,100	2,,0,,5,0
4	Annual Subscriber Revenues						
	More Than \$480,000 But		4 441 474	7,326,404	2,209,022	5,117,382	4,493,595
	Not More Than \$640,000	9,610,967	2,284,563	7,320,604	*******	3/22//342	4,470,000
5	Annual Subscriber Revenues		11,410,488	30.911.693	8.558,283	22/353,410	19,968,771
	Mot: Than \$640,000	42,322,181				¥	
•	fotal	\$69,881,309	\$18,394,747	\$51,486,562	\$13,346,526	\$30,140,016	1)1'41'555
				Percent	of Revenue		
	,					•	
7	Annual Substriber Revenues Not More Than \$160,000	100.0%	46.81	51.21	14.48	38.8%	61,21
	Annual Subscriber Revenues						
•	More That, \$160,000 But						
	Not More Than \$320,000	100.0%	22.7	77.3	22.2	55.1	44.9
,	Accord Achaeathan Bassanan						
,	Annual Subscriber Revenues Note Than \$320,000 But						
	Not Hore Than \$480,000	100.0%	20.6	79.4	5.3	74.1	25.9
10	Annual Subscriber Revenues						
	More Than \$480,000 But						
	Not Hore Than \$640,000	100.0%	23.8	76,2	23.0	53.2	46.0
11	Annual Subscriber Revenues						
	More Than \$640,000	100.0%	27.0	73.0	20.2	52.6	47.2
12	Total	-100.6%	26.3	73.7	19.1	54.6	45.4

Moter Detail may not add to total due to counding.

Source: Cois. (1)-(3): Television Digest, Inc., Television Pychoch,
3574-1935 Edition/No. 41, Services and Stations
Yoluncy Catv and Station Congrue Atlan, 1975.
Colo. (4)-(5): American Research Bureau, Arbitron Television 1974
County Coverage.

includes those systems which retransit only breadcast signals which are required to be retranslitted pursuant to PCC rules and regulations. Those systems which retransait the signals of stations within whose Grade's Contout the system is located, plus other "significantly viewed" signals in the county in which the system is located.

Includes those systems which retransit one or more broadcast signals which are not required to be retransmitted pursuant to PCC rules and repulations.

Includes those systems which retransait "cupyright qualifying" broadcast signals which do not achieve "populative" of at least 0.5%. The minimum reporting standard of the Arbitron television rating service is 0.5%. Includes those systems which retransait "cupyright qualifying" broadcast signals which do achieve "populative" of at least 0.5%. The minimum reporting standard of the Arbitron television rating service is 0.5%.

SUMMARY
COPYRIGHT FEES FOR
LIABLE TELEPROMPTER CABLE SYSTEMS
PER TELEPROMPTER PROPOSAL
BY REVENUE CLASSIFICATION

Copyright Fee per Subscriber per Month (4)+(2)+12.	\$.102	.149	.102	.142	.134	\$.132
Copyright Fee as a Percent of Subscriber Revenues (4)+(3)	1.824	2.61	1.69	2.60	2.42	2.358
Copyright Fee per Proposal (4)	\$ 22,617	113,908	85,740	133,064	541,052	\$896,381
nual Subscriber Revenues	\$ 1,240,940 . \$ 22,617	4,360,806	5,067,498	5,117,382	22,353,410	\$38,140,036
Number of Subscribers (2)	18,545	63,642	69,892	78,262	335,569	565,910
Number of Systems	11	19	13	ø	20	81
Revenue Classification	Annual Subscriber Revenues Not More Than \$160,000	Annual Subscriber Revenues More Than \$160,000 But Not More Than \$320,000	Annual Subscriber Revenues More Than \$320,000 But Not More Than \$480,000	Annual Subscriber Revenues More Than \$480,000 But Not More Than \$640,000	Annual Subscriber Revenues More Than \$640,000	Total Systems Liable
Line	н	и	m m	•	w	ø

Source: Tables IV-A through IV-E.

COPYRICHT FEES FOR TELEPROMPTER CABLE SYS-ES HITH ANNULL SUBSCRIBER REVENUES THAN \$160,000 PER TELEPROMPTER PROPOSAL

Copyright Fee per Subscriber per Month (4) * (1) * 12	**************************************	\$.102
Copyright Fee as a Percent of Subscriber Revenues (4)+(2)	0.21 1.68 1.100.56 1.	1.828
Copyright	2 1 2 1 2 1 2 1 2 1 2 2 2 2 2 2 2 2 2 2	\$22,617
*Popularity" (3)	1000040440084604774440	
Annual Subscriber Revenues i	103, 620 1140, 620 1140, 620 1140, 620 1156, 814 115, 480 1175, 48	\$1,240,940
Number of Subscribers (1)	, 1,1,1,1,1,1,1,1,1,1,1,1,1,1,1,1,1,1,1	18,545
System Location S	Bell Canyon, Calif. Willits, Calif. Belly Hill, Fla. Belly Hill, Fla. Belly Hill, Fla. Kirliana, Fla. St. Cloud, Fla. Cut Blak, Mont. Potrales, Not. Soreles, N.M. Tucurcali, N.M. Tucurcali, N.M. Cooper, Tox. Honey Grove, Tex. Honey Grove, Tex. Roalesburg, W. Va.	Total Systems Liable

Derived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 12.
"Topularity" estimates represent the market share percentage of non-network programming carried on copyright qualifying signals. This system posts two monthly subscription rates; these data reflect the lower rate.
"Excludes systems with zero popularity.

Source: Cols. (1)-(2): Tulevision Digest, Irr., Television Factbook, 194-1975 Edition/Nc. .4, Services Volume. Col. (3): Marican Research Bureau, Arbitron Television 1974 County Courty Coverage.

1	COPYRIGHT PERS TOR	TELEPHONETER CABLE SYSTEMS WITH ANNUAL SUBSCRIBER REVENUES	NORE THAN \$160,000 BUT NOT MORE THAN \$320,000	The party of the p
		TELEPHONY	201	

Copyright Fee per Subscriber [4] (1) - 13		
Copyright Fee as a Percent of Subscriber Revenues (4) (2)		4444
Copyright Fee per Proposal (2)x(3)x286 (4)	# 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4	
Popularity**	品の000018801万78点はほどびによりびことだ	
Annual Subscriber Revenues (2)	### ##################################	
Number of Subscribers (1)		
System Location	Milytes, Calif. Milytes, Calif. Meyort Bach. Siere Bach. Siere Made. Calif. Siere Made. Calif. Denrynine Palus, Calif. Denrynine Palus, Calif. Denrynine Palus, Calif. Trindad, Colo. Er. Metaburg. Pla. Ecestili, Mah. Mikefilih, Moh. Mikefilih, Moh. Eralined, Nin. Mikefilih, Moh. Eralined, Nont. Lovington, M.M. Silver City, M.M. Grando, M.M. Grando, M.M. Grando, W.Y. Grando, W.W. Millian, Woo. Richlands, W. Millian, Woo.	

Derived by multiplying the product of the system's monthly subscription rate and the mulbor of subscribins by 1 and the mulbor of subscribins by 1 and the multiply of stients represent the market share percentege of non-network programming carried on copyright-qualifying signals. This system posts two monthly subscription rates; these data reflect the lower rates.

Excludes systems with zero popularity.

Source: Cols. (1)-(2): Television Digest, Inc., Television Factbook, 1974-1975 Zeltion/No. 44, Services Volume. Col. (3): American Research Eureau, Arbitron Television 19, Courty Coverses.

TABLE IV-C

COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS WITH ANNOAL SUBSCRIBER REVENUES HORE THAN \$320,000 BUT NOT WORE THAN \$480,000 PER TILEPROMPTER PROPOSAL

System Location	Number of Subscribers (1)	Annual Subscriber Revenues!	"Popularity" 2	Copyright Fee Per Proposal (2)x(3)x28%	Copyright Fee as a Percent of Subscriber Revenues (4) f(2)	Copyright Fee per Subscriber per Month (4) (1) +12
Prescott, Ariz. Kings Beach, Calif. Los Gatos, Calif. Ontorio, Calif. Liberal, Kan. Caribou, Maine Ecanaba, Hich. Ironwood, Mich. Sault Ste. Marie, Mich. Kalispell, Mont. Islip, N.Y. Palestine, Tex.	84484848984888 4846988888888888888888888	424,398,068 33214,398,068 361,260 335,016 331,334 411,500 474,596 408,480	**************************************	1,188 1,114 1,190 1,190 1,190 17,678 12,677 13,198 1,194	000 044480000 44469000000000000000000000000000000	8 100 101111111000000000000000000000000
Richland, Wash. Total Systems Liable	5,855 69,892	442,638 \$5,067,498	o.	11,154	1.69%	\$.102

Derived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 12.
**Popularity* estimates represent the market share percentage of non-network programming carried on copyright-qualifying signals.
**Excludes systems with zero popularity.

Source: Cols. (1)-(2): Derived from Television Digest, Inc., Television Factbook, 1974-1975 Edition/No. 44, Services Volume.
Col. (3): American Research Bureau, Arbitron Television 1974 County Coverage.

COPTRICHT PERS FOR	OCTER CALLE SYSTEMS WITH ANNOLL SUBCRIBER REVENUES MORE TEAN \$480,000 BUT NOT HORE THAN \$640,000 PER TELEPROPIER PROPOSAL
COPTRI	HIBPROGIEK CARLE SYSTEMS WITH AN MORE THAN \$480,000 BUT NOT PER TELEPROGIEK

1

System Counties	Number of Subscribers (1)	Annual Subscriber Revenues (2)	*Popularity**	Copyright Fee per Proposal (2)x(3)x286 (4)	Copyright Fee as a Percent of Subscriber Revenues (4)+(2) (5)	Copyright Zee per Subscriber per Wonth (4)+(1)+12 (6)
Dothan, Ala. Zewitton, Ida. Morcater, Mass. Worcater, Mass. Goan City, N.J. Vanthor, W.J. Varinor, W.W. Faraington, W.W. Walla Walla, Wab. Henatche, W.W. Heiraont, W.W. Herganton, W.W.	4 6 0 1 1 1 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0	# (1980)	_{ಬ್} ಂಬೆಂಸಿಇಲ್ಲಿಲಂಸಿಬಂ	# 7,269 21,264 21,264 13,738 13,538 15,639 21,035 4,915	4 6 44444 60 6 6 44444 60 6 6 4444 60 6 6 4444 60 6 6 4444 60	
Total Systems Liable	78,262	\$5,117,382		\$133,064	2.600	\$.142

Derived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 12.

**Popularity* estimates represent the market share percentage of non-methority programming carried on copyright—qualifying signals.

**Dopularity* estimates are based on the number of winter subscribers.

**Excludes system are based on the number of winter subscribers.

**Excludes system with zero popularity.

**Source: Cols.(1)=(2): Television Digest, Ind., Television Pattbook, 1974.

County Coversion Abstract Television 1974.

County Coversion

COPYNICHT FZES FOR COPYNICHT FZES FOR TELEPROMPTER CABLE SYSTEMS HITH ANNUAL SUBSCRIBER AEVENUES FOODOSAL FELEPROMPTER PROPOSAL

Copyright Tee per Subscriber per Wonth	(6) (3) 122	\$.050	.050	٠,	.35	•	.412	•		.125	•T.	107	160	.255	.102	.056	.112	.209	.124	, 3			.037	i	010	.07	\$.134
Copyright fee As a Percent of Subscriber Revenues	(5)	0.84	0.0	• •	7.56	•	1.6	•	• ;	2.52	, o	1.96	1.40	3.6	1.66	1.12	2.26	3.66	2.52	.:	79.6	;	0.28	,	1.40	1.13	2.428
Copyright Fee	(2) x (3) x 20¢ (4)	\$ 10,559	13,803	1 6	54,814	•	67,367	. 1	•	16,714	77,241	20,704	14,360	31,172	24,469	7,714	26,143	59,457	21,114		14.523		5,220	*	11,133	8,925	. £\$41,042 ··
"Popularity"	6	f.	m	00	.2	0	ដ	•	Ģ,	•	10	• ~	•	#	•	•	-;	2	•	> <	-	9	-	o.	•	•	
Annual Subscriber Revenues!	63	\$ 1,256,976	1,643,256	2,160,163	725,049	1,630,303	776,122	957,515	752,101	663,260	20671077	1.056,341	1,025,700	856,380	1,456,501	688,740	1,167,120	1,633,437	178'170	750.00	2.322.060	1,036,035	1,864,254	664,734	795,180	796,887	\$22,353,410
Mumber of	8	17,458	22,823	13,146	12,747	25,159	13,616	11,481	3,016	11,165	8.147	16,152	13,150	10,195	20,062	11,479	19,452	23,673	12,413	11.174	38.701	23,023	26,110	9,310	13,253	9,555	335,569
System Focation		Florence, Ala. Gedsden, Ala.	Huntsville, Ala.	Tuscaloss, Als.	20230c, Calff.	Santa Cruz, Calif.	Santa Maria, Califi.	Danbury, Conn.	Bradenton, Fla.	Division Time	Dalueh, Minn.	Rochaster, Minn.	Great Falls, Mont.	Missoula, Kont.	Kano, Nev.	Vineland, M.J.	Wildwood, N.J.	CLUSTS, N.H.	Nectorial W. V.	0140	Eldene, Ore.	Johnstown, Pa.	El Paso, Texas	Galveston, Texas	Clarksburg, W.Va.	La Crosse, Wisc.	Total Systems Liable

Derived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 13.

The and the number of subscribers by 13.

Popularity setlates represent the market place percentage of non-mathority programing exerted on copyright-qualifying signals.

Factudes systems are based on the number of winter subscribers.

Source: Cols. (1)-(2): Television Diges, Inc., Television Tectbook, 1914-1975
Col. (3): Addition/ho. 44, Services Volume.
Col. (3): Addition Research Bureau, Arbitton Television 1914 Courty
Coverage.

COMPARISON OF COPYRIGHT FEES FOR TELEPROMPTER CABLE SYSTEMS PER H.R. 1223 AND TELEPROMPTER PROPOSAL³

		as a Perce	Copyright Fee as a Percent of Subscriber Revenues	er Revenues	per	Copyright Fee per Subscriber per Month	Month
1. 0.000	Revenue Classification	H.R. 2223	TPT Proposal: Liable Systems Only	TPT Proposal: All Systems	H.R. 2223	TPT Proposal: Liable Systems Only	TPT Proposal: All Systems
		•	(2)	(3)	€	(2)	. (9)
ન	Annual Subscriber Revenues Not More Than \$160,000	0.50\$	1.82	0.718	\$.026	\$.102	\$.037
~	Annual Subscriber Revenues More Than \$160,000 But Not More Than \$320,000	0.67	2.61	1.44	•038	.149	.081
м	Annual Subscriber Revenues More Than \$320,000 But Not More Than \$480,000	0.87	1.69	1.25	.051	.102	*0.
~ ,	Annual Subscriber Revenues More Than \$480,000 But Not More Than \$640,000	1.15	2.60	1.38	.062	.142	.075
v,	Annual Subscriber Revenues More Than \$640,000	1.88	2.42	1.28	.112	.134	•076
φ	Total	7.488	2.351	1.288	\$.086	\$.132	\$.075
*	Sources	Cols. (1) & (Cols. (2) & (Col. (Col. ((4): Table II. (5): Table IV. (3): Table IV, (6): Table IV,	861.	(4) + Table II, Col.	(3) . (1) † 12.	

n/e/r/a

TABLE V

TABLE VI

DISTRIBUTION OF TELEPROMPTER CABLE SYSTEMS WHICH RETRANSMIT "COPYRIGHT QUALIFYING" SIGNALS BY "POPULARITY" AND BY PROXIMITY TO THE TOP-100 TELEVISION MARKETS

.	"Poj	oularity" R	ating1	
Proximity to Top-100 TV Market	Minimal Viewing ²	1-3 Percent (Number of	4 Percent or More Systems)	Total
•	(1)	(2)	(3)	(4)
Within 35- Mile Radius	16	7	2	25
Outside 35- Mile Radius	10	18	51	79
		-(Percent o	f Systems)	
Within 35- Mile Radius	64%	28%	8%	100%
Outside 35- Mile Radius	13%	23%	65%	100%

¹Market share percentage of viewing of copyright-qualifying signals in the county in which cable

Source: Derived from Tables II-A through II-E and Tables IV-A through IV-E.

systems are located.

Systems retransmitting signals which do not achieve "popularity" of at least 0.5%. The minimum reporting standard of the Arbitron television rating service is 0.5%.

APPENDIX

ANALYSIS OF COPYRIGHT FEE IMPACT OF H.R. 2223 AND TELEPROMPTER PROPOSAL UPON SYSTEMS LOCATED WITHIN THE CONGRESSIONAL DISTRICTS OF MEMBERS OF THE HOUSE JUDICIARY SUBCOMMITTEE ON THE COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

In addition to the study presented in the body of this report, we were requested by MPAA to prepare an analysis of copyright fee liability under H.R. 2223 and the TPT proposal for systems located within the Congressional Districts of members of the House Judiciary Subcommittee on the Courts, Civil Liberties, and the Administration of Justice. Pursuant to this analysis, MPAA furnished us with a list of those cable systems which they determined to lie within each such Congressional District. Time constraints did not permit verification of these data; accordingly, the results of this analysis necessarily reflect the data provided by MPAA.

I. COPYRIGHT FEE IMPACT OF H.R. 2223 ON CONGRESSIONAL DISTRICT SYSTEMS

H.R. 2223 fee schedule for the 23 cable systems in the six Congressional Districts selected for analysis. Liability amounts to less than nine-tenths of 1 percent (0.84 percent) of total system revenues, or 4.9 cents per subscriber per month as in Columns (6) and (7). The range is from a high of 0.96 percent and 5.6 cents for the eight systems in the Illinois 19th, to a low of 0.50 percent and 2.5 cents for the single system in the New York 21st. Tables 1-a through 1-f

present data for each cable system in each Congressional District by revenue classification.

As a group, the 23 systems in the Congressional Districts are located predominantly within the lower revenue classifications. Nineteen systems, accounting for more than one-half of the subscribers, are in the two lowest revenue classes (annual revenues under \$320,000), with fee impacts of 0.5 percent and 3 cents per subscriber per month, and 0.64 percent and 3.6 cents, respectively. Three systems, with 28 percent of the subscribers, fall into the mid-range revenue class (\$320,000-\$480,000), with a fee impact of 0.91 percent and 5.6 cents per subscriber per month. Only one system, in the Illinois 19th, falls into the highest (over \$640,000) revenue class with impacts of 1.43 percent and 8.5 cents per subscriber per month. Overall, as indicated above, copyright fees per H.R. 2223 for the 23 Congressional District systems . work out to less than 1 percent of annual revenues and less than a nickel per subscriber per month.

II. EXEMPTION EFFECT OF PROPOSAL ON CONGRESSIONAL DISTRICT SYSTEMS

Applying our definitions of signal qualification and "popularity" from the TPT proposal to the 23 Congressional District cable systems results in outright exemption from copyright liability for 11 systems, accounting for 32.. percent of total revenues. The data for each Congressional District are presented in Table 2, Column (6). The effect on

revenue exemption by district is found in Table 2-a, Column (6). All the systems in three Congressional Districts (Massachusetts 4th, California 39th and New York 21st) are exempt entirely.

III. COPYRIGHT FEE IMPACT OF PROPOSAL ON CONGRESSIONAL DISTRICT SYSTEMS

For the 12 systems in three Congressional Districts that remain liable by application of the TPT proposal, copyright fee payments amount to 0.70 percent of revenues, or 4.1. cents per subscriber per month. These data are presented in summary form by Congressional District and revenue classifications in Table 3. Tables 3-a through 3-f present the data for each cable system which remains liable for payment under the TPT proposal. The revenue classification section of Table 3 shows, that for systems which remain liable, the greatest relative fee impact is experienced by smaller systems with lowest annual revenues. As shown in Column (5), for the four systems in the under \$160,000 class, copyright fees amount to 1.69 percent of revenues as contrasted with a weighted average liability for all systems of 0.70 percent. From Column (4), note that the absolute dollar liability for the four smaller systems with 2,631 total subscribers is higher (\$3,426) than the liability for the one largest system with 10,504 subscribers (\$2,100).

The disparities that result under the TPT proposal are also reflected by the data in Table 3-a (Illinois 19th

n/c/1/0

CD). One cable system in Monmouth with 1,453 subscribers has a copyright liability of \$2,834 on revenues of \$112,462, or 2.52 percent and 16.3 cents per subscriber per month. The cable system in Moline, with 10,504 subscribers, has a copyright fee of only \$2,100 on revenues of \$749,986, or 0.28 percent and 1.7 cents per subscriber per month.

IV. COMPARATIVE FEE IMPACT OF H.R. 2223 AND PROPOSAL ON CONGRESSIONAL DISTRICT SYSTEMS

To summarize our findings thus far, application of the TPT proposal exempts 11 systems and almost \$1.4 million in system revenues from all liability. The copyright fee impact in toto for systems in the three Congressional districts which remain liable under the TPT proposal is lower than under H.R. 2223. Overall, liability is reduced in absolute dollars from \$35,328 under H.R. 2223 to \$19,971 under TPT's proposal. The rate is reduced from 0.84 percent to 0.70 percent and the fee per subscriber per month from 4.9 cents to 4.1 cents.

The "bottom line" result of the true effective rates is shown in Table 4. Copyright fees for the 12 systems in the three Congressional Districts that remain liable for payment

This effect is not necessarily true on a system-by-system basis. For two small cable systems in Carthage and Monmouth, Illinois (19th CD), liability amounts to \$757 (0.50 percent and 3.2 cents per subscriber per month) under the provisions of H.R. 2223. (See Table 1-a.) Under TPT's proposal, these same two systems are liable for \$3,271 (2.16 percent and 13.6 cents per subscriber per month). (See Table 3-a.)

A-5

under TPT's p oposal amount to 0.47 percent of the full 23system revenue total or 2.8 cents per subscriber per month, as
compared with 0.84 percent and 4.9 cents per subscriber per
month under H.R. 2223.

Source: Tables 1-a through 1-f.

SUPPLIANT PEES TON CABLE SYSTEMS ELECTED CONGRESSIONAL DISTRICTS PER B.R. 2233
BY DISTRICT AND REVENUE CLASSIFICATION

Copyright . Fee per Subsection per Konth [3]*[1]*12	\$.056	1054	.04	.033	.030	.025	\$.049		\$.030	•036	950.	•	\$80.	\$.049
Copyright Fee as a Percent of Subscriber Revenue (5)+(3)	0.961	0.83	0.80	0.59	0.50	0.50	0.14		0.50	9;	16.0 .	•	1.43	0.84
Copyright Tee per M.R. 2223 (5)	\$21,559	5,205	3,555	3,255	1,364) jo	127.22		\$ 3,531	9,790	11,257	•	30,750	\$35,328
Revenue per per Subscriber (3) • (1) • 13	\$5.86	6.50	5.95	5.55	6.00	\$.00	\$5.90		\$5.96	3.6	. 9		5.95	\$5.90
Annual Subscriber Revenues (3)	\$2,225,098	624,000	442,222	553,590	272,880	78,000	14,225,790		\$ 706,450	1,538,938	1,230,416	•	749,986	\$4,225,790
Average Number of Bubscribers per System (2)	4,007	¢,000	1,548	1,661	1,263	1,300	2,593		934	3,225	\$55.5	•	10,504	2,593
Munber of Subsectibers (1)	32,057	000*	6,190	\$,305	3,790	1,300	59.642		9,885	22,577	16,676	•	10,504	29,62
Congressional Districts and Number of Systems	Illinois-19th CD 8 Systems	Massachusetts-4th CD 2 Systems	Wisconsin-2nd CD 4 Systems	Hew York-29th CD 5 Systems	California-39th CD 3 Systems	New York-21st CD 1 System	Total 23 Systems	Revenue Classification and Number of Systems	Annual Subscriber Revenues Not More Than \$160,000 12 Systems	Annual Subscriber Revenues More Than \$160,000 But' Not More Than \$320,000 7 Systems	Annual Subscriber Revenues More Than \$320,000 Rut Not More Than \$480,000 3 Systems	Annual Subscriber Revenues More Than \$480,000 But Mor More Than \$640,000 O Systems	Annual Subscriber Revenues More Than \$640,000 1 System	Total 23 Systems
rine.	-	4	~	•	•	•	•		•	•	ន	#	Ħ	ង

CABLE SYSTEMS IN ILLINOIS 19th DISTRICT (HON. TOM RAILSBACK)
PER II.R. 2223

Copyright Fee per Subscriber Der Honth (3)+(1)+12 (5)	\$. 032 032		9500	\$80.	\$.056
Copyright Fig. as a Bercent of Subscriber Revenues (3) +(2) (4)	2000 2000 2000 2000	0.66 0.55 0.72 0.66	0.93	1.43	0.96%
Copyright Ree per H.R. 2223 (3)	\$ 195 562 757	1,576 1,645 2,012 6,105	3,947	10,750	\$21,559
Annual Subscriber Revenues 1	\$ 39,056 112,462 151,518	237,600 227,052 184,600 281,226 930,478	423,116	749,986	\$2,255,098
Number of Subscribers (1)	547 1,453 2,000	3,600 3,180 2,586 4,261 13,627	5,926	10,504	32,057
Revenue Classification and System Location	Annual Subscriber Revenues Not Pore Than \$160,000 Carthage Honmouth Total	Annual Subscriber Revenues More Than \$160,000 But Not ince Than \$320,000 But Dixon Kewanee Macobb Rock Island Total	Annual Esbectbor Revenues Annual Esbectbor Revenues Note Than \$320,000 But Not Fore Than \$480,000 Sterling Annual Subgettber Revenues	Koline	Total: All Systems

Note: Systems in Congressional District provided by the Motion Picture Association of America.

Derived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 12.

**Based on unrounded copyright fee.

Source: Cols. (1)-(2): Television Digest, Inc., <u>Television Factbook</u>, 1974-1975 Edition/No. 44, Services Volume. Col. (3): Dorived from fee schedule in H.R. 2223.

COPYRIGHT FEES FOR CABLE SYSTEMS IN MASSACHUSETTS 4th DISTRICT (HON. ROBERT F. DRINAN)
PER H.R. 2223

Copyright Fee per Subscriber Per Month (3) +(1) +12 (5)	\$.038	190*	\$.054
Copyright ge as a Percent of Subscriber Fevenues (3) + (2) (4)	0.584	0.95	0.836
Copyright Fee per H.R. 2223 (3)	\$1,111	4,094	\$5,205
Annual Subscriber Revenues ¹ (2)	\$191,100	432,900	\$624,000
Number Of Subscribers (1)	2,450	055,2	000'8
Revenue Classification and System Location	Annual Subscriber Revenues Note Than \$160,000 But Not Hore Than \$320,000 Gardner	Annual Subscrib r Revenues More Than \$320,000 But Not More Than \$4.0,000 Fitchburg	Total: All Systems

Note: Systems in Congressional District provided by the Motion Picture Association of America. 'Derived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 12.

Source: Cols. (1)-(2): Television Digest, Inc., Television Factbook, 1974-1975
Edition/No. 44, Services Volumo.
Col. (3): Derived from fee schedule in H.R. 2223.

COPPLICHT PRES FOR CASTEMY IN WISCONSIN PER H.R. 2223

и " М М"	(3) (4) (3)+(1)+12 (4) (5)	\$ 301 0.50% \$.030 14 0.50 0.504 0.018	00.00		3,216 0.86052
Annual Co Subscriber F	6	60,190 2,772 4,860	7784/0		374,400
Mumber Su of Su Subscriberc R	(3)	80 60 80 60 40 80 40			5,200
Revenue Classification and System Location		Annual Subscriber Revenues Not Hore Than \$160,000 Baraboo La Valle Honona	criber 320,000	Not More Than \$480,000	Not wore Than \$480,000 Madison

Mote: Systems in Congressional District provided by the Motion Picture Association of Maerica. *Derived by multiplying the product of the system's monthly subscribtion rate and the number of subscribers by 12. **Based on unrounded copyright fee.

Source: Cols. (1)-(2): Talevision Digast, Inc., Television Factbook, 1974-1975 Edition/No. 44, Services Volume.

Col. (3): Derived from fee schedule in H.R. 2223.

COPYRIGHT FEES FOR CALLE SYSTEMS IN NEW YORX 29th DISTRICT (HOM: EDWAND W. PAITLEOM) PER H.R. 2223

Copyright Stee Per Subsection Per Month (3) +(1) +12 (5)	6.030 .035 .035 .031	.032 .034 .034 .033
Copyright Fee as a Percent of Subscriber Revenues (3) +(2) (4)	, , , , , , , , , , , , , , ,	0.00 0.00 0.00 0.00 0.00
Copyright Fee per H.R. 2223	\$ 2229 2729 8129	914 1,660 2,574 83,255
Annal Subscriber Revenues:	\$ 36,000 \$5,870 54,360 136,230	171,360 246,000 417,360 417,360
Mumber of Subscribers (1)	500 550 755 1,605	2,400 4,100 6,500 8,305
Revenue Classification and System Location	Annual Subscriber Ravenues Not Hore Than \$186,000 Granville Hunter Hhitehall Total	Annual Subscriber Revenues Hore Than \$160,000 But. Not Vore Than \$120,000 Catekill Clear Falls Total Total All Systems

Mote: Systems in Congressional District provided by the Motion Picture Association of America. Iperived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 12.
*Based on unrounded copyright fee.

Source: Cols. (1)-(2): Television Digest, Inc., Television Factbook, 1974-1975 Edition/No. 44, Services Volume.

Col. (3): Derived from fee schedule in N.R. 2223.

COPYRIGHT FEES FOR CHARLES E. WIGGINS) CABLE SYSTEMS IN CALIFORNIA 3PER H. R. 2223

Revenue Classification and System Location	Number of Subscribers	Annual Subscriber	Copyright Fee per H.R. 2223	Copyright Fee as a Percent of Subscriber Revenues	Copyright Fee per Subscriber Per Month
	ε	(3)	(3)	(3)+(5) (4)	(3) + (1) (5) (5)
Annual Subscriber Revenues Not Hore Than \$160,000	•				
Bres	068	\$ 64,080	\$ 320	0.50%	\$.030
La Habra	2,050	147,600	738	0.50	.030
Tuctin	850	61,200	306	0.50	.030
Total	3,790	272,880	1,364	0.50	.030
Total: All Systems	3,790	\$272,880	\$1,364	0.50	\$. 030

Source: Cols. (1)-(2): Television Digest, Inc., Television Factbook, 1974-1975 Edition/No. 44, Services Volume. Col. (3): Derived from fee schedule in H.R. 2223.

CABLE SYSTEMS IN NEW YORK 21st DISTRICT (HON. HERMAN BADILLO) PER H.R. 2223

ad on unrounded copyright fee.
Source: Cols. (1)-(2): Tolevision Digest, Inc., Television Factbook, 1974-1975
Edition/No. 44, Services Volume.
Col. (3): Derived from fee schedule in H.R. 2223.

SELECTED CONCRESSIONAL DISTRICT CARLE SYSTEMS COPPLICHT QUALIFICATION STATUS PER TELEPRONPTER PROPOSAL

				Munher	Mumber of Systems with		
43	Line Concessional District	Total Execusa	Mon-Copyright Qualifying Broadcast Signals	Copyright Outlifying Broadcast Signals	Copyright Oualitying Broadcast Signals with Mo Measured Viewing	Copyright Cualifying Broadcast Bignals with Measured Viewing	Exemptions from Copyright Liability
		6 6 6 6	(2)	(C) (C)	•	8	(3) • (2) (9)
	Illinois-19th CD	•	۰	•	•	-	ø
~	Massachusetts-4th CD	н	3	~	~	•	~
~	Wisconsin-Ind Co	•	•	-	~	~	~
•	Hrs York-19th CD	•	•	•	•	~	•
•	California-19th @	•	~	-1	4	•	
•	New Tork-21st CD		-	•	•	•	-
•	fotal	a .	M	ឧ	e-t	#	্ৰ
				Perce	Percent of Bystame		
**	Illinois-19th @	100.00	1	100.00	•	100.00	•
•	Massachusetts-4th CD	100.001	•	100.0	100.00	•	100.00
ä.	Wisconsin-2nd CD	100.001	•	100.0	\$0.0	50.0	90.0
#	New York-29th CD	100.001	•	100.0	60.0	40.0	60.0
2	Celifornia-19th CD	100.001	66.30	33.3	33.3	•	100.0
2	New York-21st CD	100.001	100.0	•	•	•	100.0
7	Total	100.001	13.0.	97.0	34.8.	\$2.2.	47.8

Includes those systems which retransmit only broadcast signals which are required to be retransmitted present to 70 to 10 and requisition. Those systems which retrains the signal as of retrained to 70 and 10 areas which retrained the objects of 10 and 10 areas and

Source:

Col. (1): Systems in Congressional District provided by the Notion Ficture

Cols. (2)-(3): Taley-laion of America.

Cols. (2)-(3): Taley-laion District. Taley-laion Pactbook, 1974-1973 Edition/No. 4

Services and Exations Volument CAPP C. 3 Stellon Congress Aliat. 1973.

Cols. (4)-(5): American Research Bureau, AUDITION TRIBEY-1874 County Congress.

TABLE 2-a

REVINUES OF SELECTED CONCRESSIONAL DISTRICT CABLE SYSTEMS BY COPYRIGHT QUALIFICATION STATUS PER TELEPHONPTER PROPOSAL

					Revenues of Sys	iess With:	
Line	Congressional District	Total Systems	Non-Copyright Qualifying Broadcast Signals ¹	Copyright Qualifying Broadcast Signals	Copyright Qualifying Broadcast Signals with No Measured Viewing	Copyright Qualifying Broadcast Signals with Measured Viewing	Execution from Copyright Liability
		(2)+(3) (1)	(2)	(4)+(5) (3)	(4)	(5)	(2)+(4) (6)
1	Illinois-19th CD	\$2,255,098	•	\$2,255,098	-	\$2,255,098	-
2	Massachusetts-4th CD	624,000	-	624,000	\$624,000	-	\$624,000
3	Wieconsin-2nd CD	442,222	-	442,222	62,912	379,260	62,912
4	Hew York-29th CD	553,590	-	553,590	336,360	217,230	336,360
, 5	California-39th CD	272,860	\$211,680	61,200	61,200	-	272,880
16	New York-21st CD	78,000	780,000	•	-	-	78,000
7	Total	\$4,225,790	\$289,680	\$3,936,060	\$1,084,472	\$2,815,588	\$1,374,152
				Sercent	of Revenues		******
	Illinois-19th CD	100.0%	-	100.01	-	100.0%	-
•	Massachusetts-4th CD	100.03	-	100.0	100.08	-	100.0%
10	Wisconsin-2nd CD	100.01	-	100.0	14.2	45.0	14.2
11	New York-29th CD	100.01	-	100.0	60.8	39.2	60.8
12	California-39th CD	190.04	77.69	22.4	22.4	-	100.0
13	New York-21st CD	100.04	100.0	-	-	•	100.0
14	Total	100.0%	6.9	93.1	25.7	67.5	32.5

'Includes those systems which retransmit only broadcast signals which are required to be retransmitted pursuant to FCC rules and regulations. (Those systems which retransmit the signals of stations within whose Grade B contour the system is located, plus other "significantly viewed" signals in the county in which the system is located.)

Includes those systems which retransmit one or more broadcast signals which are not required to be retransmitted pursuant to FCC rules "d regulations.

Includes those systems which retransmit "copyright qualifying" broadcast signals which do not achieve "popularity" of at least 0.5%. The minimum reporting standard of the Arbitron television rating service is 0.5%.

Includes those systems which retransmit "copyright qualifying" broadcast signals which do achieve "popularity" of at least 0.5%. The minimum reporting standard of the Arbitron television rating service is 0.5%.

Source:

Col. (1): Systems in Congressional District provided by the Motion Picture Association of America.

Cols. (2)-(3): Television Digest, Inc., Television Factbook, 1974-1975 Edition/Mo. 44, Services and Stations Volumes: CAFA and Station Coverage Atlas, 1975.

Cols. (4)-(5): American Research Bureau, Arbitron Television 1974 County Coverage.

TABLE 3

SUPPLIES CHANNE STREET
Fine	Constantional District.	Mumbe: of fysters	Mumber of Subscribers	Annual Subscriber Revenues	Copyright Yes per Proposed	Copyright Fee as a Percent of Subscriber Revenues	Copyright Fee per Subscriber Per Month.
		a	Ē	6	3	(4) + (3) (5)	(4) +(2) + 12 (6)
-	Illinois-19th CD	•	32,057	\$2,255,098	817,239	0.764	\$.045
~	Massachusetts-4th CO	•	1	•	•	•	•
•	Wisconsin-2nd CD	~	5,281	379, 260	2,134	95.0	.034
•	New York-19th CD	~	2,950	217,230	90	0.28	.017
•	California-39th CD	•	•	•	•	•	•
•	New York-21st CD	o		•	ı	•	•
•	Total	믜	40,288	\$2,651,588	116.612	4.70	1.041
	Revenue Classification						
•	Annual Subscriber Mevenues Mot Nore than \$160,000	•	2,631	\$ 202,248	\$ 3,426	1.69	\$.109
•	Annual Subscriber Revenues More than \$160,000 But Wor More than \$320,000	*	16,027	1,101,838	6,434	9.58	.033
ខ្ព	Annual Subscriber Revenues More than \$120,000 But Not More than \$450,000	n	11,126	757,516	129'8	1.01	90.
ដ	Annual Subscriber Revenues Note than \$480,000 But Not More than \$640,000	•	•		•	•	•
ជ	Annual Subscriber Revenues More than \$640,000	4	10,504	749,986	2,100	0.28	.017
ជ	Total	끠	40,288	85'150'28	126'613	0.70	4.041

Source: Tables 3-a through 3-f.

n/c/r/a

CABLE SYSTEMS IN ILLINOIS IND. DISTRICT (HOM. TON PALLEBACK)
PER TELEPHONETER PROPOSAL.

Copyright Fee per Subscriber (4) + (1) - 13	** 1944 1944		.080	.017	\$.045
Copyright Fee as a Percent of Subscriber Revenues (4)+(2)	22.22	00400 44004 44004	1.40	0.28	0.768
Copyright Zee per Proposal (2)x(3)x286	8 2,833 3,234	44 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4	5,924	2,100	\$17,239
*Popularity**	÷	୷ଶଖନ	\$ 1	н	
Annual Subscriber Revenues (2)	* 139,056 112,462 151,518	237,600 227,652 184,600 281,226 910,478	423,116	749,986	\$2,255,098
Number of Subscribers (1)	1440 1440 1460	124,136 134,13	. 25	10,504	32,057
Revenue Classification and System Location	Annual Subscriber Revenues Not More Than \$160,000 Carthage Mancoulth Total	Anual Subactiber Revenues For Tran \$180,000 But Kit Fore Tran \$110,000 Bixon Kranse Krans	Annual Subscriber Revenues Fore 7:an \$320,000 Buc Not vore Inan \$180,000 Sterling	Annual Subseriber Revenues Pore than \$640,000 foline	Total Systems Limble

Note: Systems in Conglessional District provided by the Motion Picture Association of America.

fearived by multiplying the product of the system's monthly subscription into and in number of subscribers by 11. The and the number of subscribers by 11. Popularity's estimates represent the market share percentage of non-network programming carried on copyright-qualifying signals.

**Excludes systems with zero popularity.

Source: Cols. (1)-(2): Television Digost, Inc., Television Feetbook, 1874-1875
Edition/No. 44, Services VClume.

Col. (3): Aserican Research Bureau, Arbitron Television 1974 County
Coverage.

COPYRIGHT FRES FOR CABLE SYSTEMS IN MASSACHUSETTS 4th DISTRICT (HOW, ROBERT P, DRINAH) PER TELEPROMPTER PROPOSAL

Copyright Fee per Subscriber Per Honth (4)+(1)+12	•	ı		rica.		
Copyright Fee as a Percent of Subscriber Revenues (4)+(2)	ı	ı		siation of Am	ription non-network	, 1974-1975 n 1974 County
Copyright Pee per Proposal (2)x(3)x28%	•	1		Picture Assoc	monthly subscrercentage of :	sion Factbook
"Popularity" (3)	•	0		Systems in Congressional District provided by the Motion Picture Association of America.	Derived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 12. **Popularity" estimates represent the market share percentage of non-network programming carried on copyright-qualifying signals. **Excludes systems with zero popularity.	Television Digest, Inc., <u>Television Factbook</u> , 1974-1975 Edition/No. 44, Services Volume. American Research Bureau, <u>Arbitron Television 1974 County</u> Coverage.
Annual Subscriber. Revenues ¹ (2)	\$191,100	432,900	0 8	atrict provide	Derived by multiplying the product of the rate and the number of subscribers by 12. "Popularity" estimates represent the mark programming carried on copyright-qualify. Excludes systems with zero popularity.	Television Diges Edition/No. 44, American Researc Coverage.
Number of Subscribers (1)	2,450	055'5	o	gressional Dia	y multiplying the number of ty" estimates ng carried on systems with	Cols. (1)-(2): Te Ed Col. (3): Am
Revenue Classification and System Location	Annual Subscriber Revenues More Than \$160,000 But Not Hore Than \$320,000 Garúner	Annual Subscriber Revenues Fore Then \$320,000 But Not Fore Than \$480,000 Fitchburg	Total Systems Liable ³	Note: Systems in Con	Derived b rate and repopulari programmi breludes	Source: Cols.

u/e/t/ñ

TABLE 3-c

COPYRIGHT FEES FOR CABLE SYSTEMS IN WISCONSIN 2nd DISTRICT (HON. ROBERT KASTENNEIER)
PER TELEPROMPTER PROPOSAL

	Copyright Fee per Subscriber per Month (4) + (1) + 12 (6)	**************************************	.034	\$.034	rica.		
er)	Copyright Pee as a Percent of Subscriber Revenues (4): (2) (5)		95.0	0.568	fation of Ame	iption on-network	1974-1975 1974 County
Bert Kastenrei	Copyright Fee per Proposal (2) x(3) x28%	- 1 \$27 27	2,097	\$2,124	Picture Assoc	Monthly subscr scentage of n	ion Factbook, on Television
CABLE SYSTEMS IN WISCONSIN 2nd DISTRICT (HON. ROBERT KASTENMEIER) PER TELEPROMPTER PROPOSAL	Popularity"	500	~		Systems in Congressional District provided by the Motion Picture Association of America.	Derived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 12. **Popularity" estimates represent the market share percentage of non-network programming carried on copyright-qualifying signels. **Excludes systems with zero popularity.	Television Digest, Inc., <u>Television Factbook</u> , 1974-1975 Edition/No. 44, Services <u>Volume.</u> American Research Bureau, <u>Arbitron Television 1974 County</u> <u>Coverage</u> .
consin 2nd di Per Teleprómp	Annual Subscriber Revenues ¹ (2)	\$ 60,190 2,722 4,860 4,860	374,400	\$379,260	trict provide	the product o subscribers b represent the copyright-qua ero popularit	Television Diges Edition/No. 44, American Researd Coverage.
SYSTEMS IN WIS	Number of Subscribers (1)	843 66 81	5,200	5,281	ressional Dis	muicipiying the number of ty" estimates ig carried on tystems with z	Cols. (1)-(2): Tel Edi Col. (3): Ame
CABLE	Revenue Classification and System Location	Annual Subscriber Revenues Not Fore Than \$160,000 Baraboo La Valle Monona Total ²	Annual Subscriber Revenues Hore Than \$320,000 But Not Hore Than \$480,000 Madison	Total Systems Liable	Note: Systems in Cong	rate vec and 'rate and 'rate's propularit programmir 'Excludes s	Source: Cols.

COPYRIGHT PEES FOR CABLE SYSTEMS IN NEW YORK 29th DISTRICT (HON. EDWARD W. PATTISON) PER TELEPROMPTER PROPOSAL

Copyright Fee per Subscriber Per Month (4)+(1)+12 (6)	\$.019 .019	.017 .017	\$.017	ır i ca.
Copyright Fee as a Percent Subscriber Revenues (4)+(2) (5)	0.28	0 0 28	0.28	ciation of Ame ription non-network , 1974-1975
Copyright Fee Per Proposal (Z)x(3)x28%		94 1 88	8098	Motion Picture Association of Intem's monthly subscription hare percentage of non-network ignals. Television Factbook, 1974-1975 Volume.
"Popularity" 2	QHO	но		Systems in Congressional District provided by the Motion Picture Association of America. *Derived by multiplying the product of the system's monthly subscription * rate and the number of subscribers by 12. * rate and the number of subscribers by 12. * rate and the number of subscribers by 12. * rate and the number of subscribers by 12. * rate and the number of subscribers by 12. * rate and the number of subscribers by 12. * rate and the number of subscribers by 12. * EditLon/No. 44, Services * Volume. * Col. (3): American Research Bureau, Arbitron Television 1974 County County
Annual Subscriber Revenues ¹ (2)	\$ 36,000 45,870 54,360 45,870	171,360 246,000 171,360	\$217,230	District provided by the job the product of the sys of subscribers by 12. es represent the market son copyright-qualifying sh zero populaxity. Television Digest, Inc., Edition/No. 44, Services Edition/No. 44, Services Coverage.
Number of Subscribers (1)	550 550 755 550	2,400 4,100 2,400	2,950	in Congressional Divided by multiplying a and the number of ularity a estimate or ularity a systems with cols. (1)-(2): Telescope of the cols. (3): A E
Revenue Classification and System Location	Annual Subscriber Revenues Not Nore Than \$150,000 Granville Hunter Whitchall	Annual Subscriber Revenues More Than \$120,000 Not More Than \$120,000 Catskill Glens Falls	Total Systems Liable	Note: Systems in Cor Derived in the system and shopular programm programm secludes Source: Cols

COPYRIGHT FEES FOR CABLE SYSTEMS IN CALIFORNIA 39TH DISTRICT (HON. CHARLES E. WIGGINS) PER TELEPROMPTER PROPOSAL

Copyright Fee per Subscriber per Month (4)+(1)+12	•		k ne ki
Copyright Fee as a Percent of Subscriber Reventiber Rev	1		ciation of A ription non-network : 1974-1975 in 1974 Count
Copyright Fee per Proposal (2)x(3)x28%	1		n Ficture Assomonthly subscretage of s.
"Popularity" ² (3)	. 6		**Derived by multiplying the product of the system's monthly subscription of Amrate and the number of subscribers by 12. ***Popularity** estimates represent the market share percentage of non-network programming carried on copyright-qualifying signals. ***Excludes systems with zero popularity. ce: Cols. (1)-(2): Television Digest, Inc., Television Factbook, 1974-1975 Edition/No. 44, Services Volume. Col. (3): American Research Bureau, Arbitron Television 1974 County County
Annual Subscriber Revenues ¹ (2)	\$61,200	o s	District providing the product of subscribers of subscribers on copyright-th a zero populari Television Dige Edition/No. 44, American Resear Coverage.
Number of Subscribers (1)	. 850	ം 	by multiplying the number of ith author of ith author of ith activity as the systems with the ith (1)-(2): To col. (3): An occurrence of the number of ith activity and ith activity of ith ac
Revenue Classification and System Location	Annual Subscriber Revenues Not More Than \$160,000 Tustin	Total Systems Liable	Note: Systems in Congressional District provided by the Motion Ficture Association of America. **Derived by multiplying the product of the system's monthly subscription rate and the number of subscribers by 12. **Popularity" estimates represent the market share percentage of non-network programming carried on copyright-qualifying signals. **Excludes systems with zero popularity. **Source: Cols. (1)-(2): Television Digest, Inc., Television Factbook, 1974-1975 **Edition/No. 44, Services Volume. **Col. (3): American Research Bureau, Arbitron Television 1974 County **Coverage.**

TABLE 3-f

				COPY	RIGHT	FEES FOR			
CABLE	SYSTEMS	IN	NEW	YORK	21st	DISTRICT	(HON.	HERMAN	BADILLO)
			PE	R TELI	EPROMI	TER PROPO	SAL		

NO QUALIFYING SYSTEMS -----

n/c/r/a

COMPARISON OF COPYRIGHT FRES FOR SELECTED CONCRESSIONAL DISTRICT CABLE SYSTEMS
PER H.R. 2223 AND TELEPRONDIER PROPOSAL

		as a Perc	Copyright Ree as a Percent of Subscribor Revenues	ber Revenues	per	Copyright Fee per Subscriber per Month	Fee F Month
Line	Congressional District	H.R. 2223	TPT Proposal: Liable Systems Only	TPT Proposal: All Systems	H.R. 2223	TPT Proposal: Liable Systems Only	TPT Proposal: TPT Proposal: Liable All Systems Only Systems
		Œ	(3)	ව	•	(5)	(9)
н	Illinois-19th CD	0.968	0.768	0.770	\$.056	\$.045	\$.045
73	Massachusetts-4th CD	0.83	1	ı	.054	1	1
м	Wisconsin-2nd CD	0.80	0.56	0.48	.048	.034	6 <u>2</u> 0°
, ~	New York-29th CD	0.59	0.28	0.11	.033	.017	900-
٧n	California-39th CD	05.0	1	ı	•030	ŧ	•
vo	New York-21st CD	05.0	1		.025	1	t
۲,	Total	0.848	0°.70\$	0.478	\$.049	\$.041	\$.028
	Sources	Cols. (1) & (Cols. (2) & (Col. (Col. ((4): Table 1. (5): Table 3. (3): Table 3, (6): Table 3,	Table 1. Table 3, Col. (4) + Table 1, Col. (3). Table 3, Col. (4) + Table 1, Col. (1) +	1, 601. (3	(3) (1) ÷ 12.	

n/e/r/a

TABLE 4

[Attachment C]

MEMORANDUM

Остовев 29, 1975.

Re Calculation of cable coverage in advertising purchases.

To: Mr. Jack Valenti.

From: William H. Fineshriber, Jr.

I have spoken to the following people:

- Jay Eliasberg, Vice President, Television Network Research, CBS.
 John Cowden, Assistant to the President, CBS Television Network.
- 3. Ricaard A. R. Pinkham, Chairman Executive Committee, Ted Bates & Co. Inc.
 - 4. Max Buck, Vice President, National Sales, NBC.
 - 5. R. L. (Russ) Condit, Media Director, Procter & Gamble.
 - 6. Har
- D. Way, Manager of Media Planning, Colgate-Palmolive-Peat.
 Bardach, Vice President and Director of Broadcasting, Foote Cone & 7. Pet Belding ...vertising agency (Lever Brothers is me of their biggest clients).

 6. Harry Schroeter, Vice President, Communications, Nabisco Inc.

 I explained to each of these gentlemen the reasons for my call and obtained

from them approval to quote the substance of their answers. All of them agreed that the process of purchasing advertising on television today was generally as follows:

For national coverage one buys either network programs, portions of network programs or spots on network programs. Through these network buys one reaches anywhere from 95% to 99% of the total national TV audience (Most of the better programs in prime time are carried by stations that reach from 97% to 99%.) In making these buys, the advertiser considers total circulation; there is no breakout and no specific charge in the rate card or allocation in the advertisting budget for cable coverage. The rating services claim to cover cable homes (although some experts consider the adequacy of this measurement questionable), and to this extent these cable homes are included in total circulation for which the advertiser pays.

When the advertiser wishes to increase his impact in a given market or markets, he also buys local television programs or spots. Here again he buys total coverage of the local station without any breakout or specific charges for cable homes covered. To whatever extent that cable homes add to the local station's total

coverage, this is usually included in the advertising rate.

Mr. Pinkham, whose agency is sixth in total billings with \$136.5 million in 1974, said that all (television) buys are made on the basis of a circulation delivered. The few added viewers in remote areas that cable adds to total circulation are not particularly valuable to the advertiser . . . and in this agency the subject of cable coverage is not discussed with or becomes a factor with . . . clients.

Max Buck of NBC and Harry Way of Colgate agree that cable coverage is not considered specifically in their buying or selling operations. Mr. Buck states flat that he never even discusses cable coverage, nor does he recall ever having been asked any questions about it. He says that his sales for the NBC network are now all "individual negotiations" per spot and they are based on the total number of homes reached and the "quality" of the program in which the spots are placed. Peter Bardach says that in none of his agency's buys is cable coverage considered or even discussed; he does not recall any conversations with his clients or the networks specifically on the subject of cable coverage; the price of the spot or program purchased is based solely on its assumed total circulation as calibrated by the rating services. Mr. Buck also makes the point that he does not consider cable coverage anything additional to the normal coverage pattern of the stations he sells on the network. He feels that practically all cable homes already had television sets; were already included in the circulation figures o the stations making up his network offerings; and that the best that can be said for cable vis-a-vis circulation is that it improves the quality of reception while adding very little to the total figures.

Russ Condit of P & G says that P & G has long watched the development of cable and still keeps a careful eye on it. They still consider it so small an element in their total audience that they do not attempt a breakout of cable homes in their calculations and they make no provision for it in their budget. The networks and the local stations sell P & G their total circulation and this is what they pay for.

Mr. Condit says that at the present stage of development P & G considers it impossible to quantify any percentage of their advertising budgets for cable coverage. They do consider cable a small extension of the network audience—but not at all a straight-line extension. P & G feels that cable has added something to the total audience but that the vast majority of cable homes already had television and were included in the coverage patterns of television stations. Therefore, cable represents very few new viewers; it does afford improved reception to its clients.

Harry Schroeter of Nabisco (who is also the former Chairman of the Association of National Advertisers) makes an additional point: he says that the advertiser has very little interest indeed in the audience reached over cable through the importation of distant signals. The advertiser buys specific markets for his impact on those markets; when he buys Salt Lake City, for instance, he is not interested in a handful of rural listeners in Montana who may receive his message over cable. When local stations include this distant signal coverage in their rate cards, the advertiser often objects and wants these distant homes removed from the rate base.

[Attachment D]

METROMEDIA TELEVISION, New York, N.Y., June 26, 1975.

Hon. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: During your recent hearings on CATV Copyright before your Subcommittee, witnesses representing Cable Television have presented testimony concerning the sales value of out-of-market homes reached by television stations via cable. Our experience, which does not confirm the cable viewpoint presented, may be helpful to you in your consideration of this matter.

viewpoint presented, may be helpful to you in your consideration of this matter.

Metromedia Television operates six television stations, five of which are in-

dependent—that is not affiliated with any major network.

Both local and national spot advertisers in the past have not had any significant interest in reaching any distant home outside of the market which may be receiving their message via cable. If indeed they were interested, they have not been willing in the past to pay higher rates for any additional viewing homes.

In fact most local advertisers are interested only in reaching viewers in the metropolitan area in which they conduct their business recognizing that customer

potential from distant homes is minimal at best.

National and regional advertisers plan their advertising expenditures in spot television based on the ADI (Area of Dominant Influence.) Therefore, cable homes falling outside the ADI simply are not a factor in the price they are willing to pay.

The cable coverage also has no bearing on the price that stations pay for its' programming. Just like the national advertiser, the program syndicator establishes his price based on the size of the market not on the individual coverage of one station or another due to the number of cable systems on which that station is carried.

If I can be of further assistance, please do not hesitate to call on me.

Very truly yours,

R. KENT REPLOCLE.

KSTW TELEVISION CHANNEL 11, Tacoma. Wash., June 19, 1975.

Hon. Robert Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: I have followed with interest press accounts of hearings by your subcommittee on the question of copyright liability by cable television. A major contention put forward by cable interests is inaccurate, and should be corrected before your committee begins its deliberations.

The cable people have attempted to create the impression that, by carrying television signals beyond the area a TV station would normally cover itself, cable expands the station's effective market. This, they say, enables the station to charge higher advertising rates, which in turn results in higher copyright payments. I do not deny that most station operators wish this were the case.

Many of us have even labored to achieve that very goal. But the fact of the matter is that it doesn't work that way, nor is it likely to in the foreseeable future.

Television advertising rates are determined by the size and composition of the station's audience. There are only two generally accepted means of measuring that audience, and those are the regular audience surveys, or "ratings," issued by the A. C. Nielsen Company and the American Research Bureau. Both those companies will admit that they cannot accurately credit to each station the viewing it may receive on every cable system far from the station's home market.

Even if the rating services could, and did, fully and accurately credit such "outside" viewing, the station's advertising rates would not automatically rise in a commensurate amount. About half of an average station's revenues comes from local advertisers, retailers in the station's home community. Additional viewers hundreds of miles away are not a market for them, and they will not pay higher rates for the privilege of exposing their messages to these far-away people. The other part of station advertising revenues come from national advertisers, whose products presumably are available almost everywhere. But even they won't pay higher rates for that possible extra audience, because their buying concepts and criteria are based on the audience delivered in the so-called "Area of Dominant Influence," or that area close in to the station's home market.

I realize that this is a highly detailed and technical concept, but it is necessary to understand it in order to refute the cable interests' simple assertion that because of their additional coverage, broadcasters are charging higher rates and paying additional copyright fees. That just isn't so.

I hope you will call this to the attention of the committee's membership and staff, so that complete information can be elicited. Thank you very much for your time and consideration.

Sincerely.

CRAWFORD P. RICE, Vice President and General Manager.

INDEPENDENT TELEVISION STATIONS, INC., New York, N.Y., June 17, 1975.

Hon. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: It is my understanding that during last week's hearings on CATV copyright before your Subcommittee, witnesses representing the cable television industry presented testimony concerning the sales value of out-of-market homes reached by television stations via CATV. Hopefully, the following information will be of assistance to you in your deliberations.

It is true that the Association of Independent Television Stations (INTV) has sought to interest advertisers in purchasing those out-of-market cable subscribers reached by independent television stations. As depicted in this week's issue of *Broadcasting* magazine, the cable industry actually displayed copies of the

coverage maps which INTV uses in its sales presentation.

However, it is significant that advertisers will not pay for these out-of-market homes. First, local advertisers have no interest in buying homes at such a distance. Second, national and regional advertisers are interested only in those homes located within the market (this area is known as the Area of Dominant Influence (ADI)). Homes outside the station's ADI simply do not figure in the price of the advertising. It may be that in certain cases an advertiser may select an independent station over a competing network affiliated station owing to the extension of the independent's signal via CATV. But this factor does not affect the price which the advertiser pays for the station's time, be it an affiliated or independent station, and it does not affect the price the station pays for its programming.

The foregoing information was confirmed in discussions with several other members of our association, located in both large and small markets. If I can be of further assistance, please do not hesitate to call on me or the President of our Association, Mr. Herman Land, at the above address.

Very truly yours,

JIM TERRELL, Chairman.

JUNE 27,1975.

Hon. CHARLES E. WIGGINS,

Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN WIGGINS: Mr. John Mercer of your office has contacted me for additional details concerning out-of-market homes reached by television stations via CATV. He was particularly interested in the relationship of advertising rates to film program costs because of the out-of-market coverage.

As previously stated advertisers will not pay for these out-of-market homes. Local advertisers have no interest in people located far from their retail area. National advertiser's buying concept is based on those homes located in the home market of the station (ADI). Additionally there is no accurate way to credit a station the viewing it may receive on a cable system. For example, last year KTVT carried the World Football League Games. Our signal was blacked out by the cable system in Monahans, Texas because the local station was also carrying the telecasts. This may have happened on other cable systems of which we are not aware. Because of this local station protection, we cannot be sure which of our programs are being carried on cable. This uncertainty further precludes advertisers from paying additional money for cable coverage. Therefore, our advertising rates have not increased because of cable coverage. And, in fact, if cable coverage were eliminated the rates would remain the same since this coverage in no way affects our pricing which is based on the home market viewing audience (ADI).

Nor does cable figure in the price we pay for film program costs. Film distributors base the price they charge for their product or the market rank. The market price for film in Dallas-Ft. Worth, the eleventh television market, will be less than the price in Washington, D.C. . . . the 9th market, but greater than the price in Houston, the 14th market.

I hope this additional information will be of help in your deliberations.

Thank you very much for your interest.

Kindest personal regards,

JAMES R. TERRELL; Vice President/General Manager.

A. Frank Reel, being duly sworn, deposes and says:

I am the President of Metromedia Producers Corporation, subsidiary of Metromedia, Inc. My Company distributes tape and film programming to television stations.

Among other activities, Metromedia, Inc. is engaged in the operation of six television staions in major United States television markets. Five of these operate as "independents"—i.e.: without network affiliation. The signals of these stations are widely retransmitted by CATV to both local and distant cable audiences.

I make this affidavit so that it may be submitted to the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary of the House of Representatives in connection with its hearing of the bill H.R. 2223.

The question to which I address myself is whether a television station pays a higher fee to the copyright owner for the licensing of a television program because of the fact that the signals of the license station are retransmitted by cable systems operating in the local market of the television station or are carried into markets distant from that of the television station in order to be distributed to the cable system's subscribers in that distant market.

Based on my knowledge of the industry as it has operated for years and operates today, I can state that no such higher payments are made to the copyright owners and that the license fee paid by the television station does not reflect in any manner the extended audience provided by distant cable systems.

My experience in this field goes back to 1954 when I became associated with a company then known as ZIV Television Programs, Incorporated. That company was acquired later on by United Artists Corporation, and after going through several changes of names ultimately was called United Artists Television, Inc. The business of ZIV and United Artists Television, Inc. was the production and distribution of television programming. I was basically in charge of overseeing all contracts on the talent side, the production side, and on the distribution side. I stayed with that company until July 1968, at which time I joined my present

company, Metromedia Producers Corporation. I first became Vice President for Business Affairs with duties similar to those I exercised for ZIV Television Programs, Inc. and for United Artists Television, I..c. I then became Executive Vice President and then President of Metromedia Producers Corporation.

My major concern today is supervision of licensing to television stations. The programs that my Company licenses to stations are either owned by my company as copyright owner or it has received the rights from the copyright owner to

distribute or to license programming produced by others.

When a station acquires a license, it is important for that station that it be the only one in the market to exhibit that program and that the same program cannot be seen-with different commercials-over another station or imported from another station by a cable system in the licensee station's market. The station demands exclusivity. For that reason we never license the same program (or even different programs of the same series) to run on two or more stations in the same city at the same time. This concept is applicable to cable importations. The obvious reason is that when a cable system imports a distant signal carrying the program that we want to license to a local station, the audience of the local station will be reduced by the number of viewers who see the program on the cable.

The syndicator must sell the big markets first to recoup his costs and then he must turn to the small markets to make a profit. If the cable system carries the program from the bigger markets to the smaller markets, syndication therein becomes difficult because cable importation reduces the value of the program to the buying station. As a result of this harmful effect, a television station may refuse to license a syndicated program or may license it only by paying a lower price than otherwise because its potential audience has been or will be exposed

to the program albeit with different commercials.

I have been informed that cable interests have contended that the loss which the copyright owner suffers in the local markets may be counterbalanced by increased license fees which he might receive from the television stations whose signals are carried into the distant markets by CATV. I understand that it has been asserted that the dollars lost for a program in the local market will be made up by those paid to the copyright owner by the station whose signals are carried into the distant market, because the license is bought on a "dollars per thousand viewers" basis. In the first place, the "viewers" are those measured by a rating service within the area dominated by the station—not some distant location. In the second place, a distant audience is not valuable to sponsors, such as local and regional advertisers or even to national advertisers to whom partial duplication of coverage in a market does not justify increased costs. Advertisers are value conscious and will not pay for wasted coverage or for coverage that is not measured by audience ratings within the immediate market area.

But most important, the economics of determining the price between the copyright owner and the licensee station is based primarily on the semi-monopolistic economy in the television market. There are only a limited number of stations in each city and (with the exception of the small number of cities that have independent VHF stations) on the average buying stations, the all-important time left for non-network programming is severely limited. Accordingly, since many programs compete for sales to such limited outlets and there is always more product than time available for syndicated programs, there exists a perpetual and structural "buyers' market" that is not and cannot be affected by increases

in coverage due to CATV.

The inevitable consequence of these economic factors is that stations obtain programs at the lowest possible price and do not make any additional payments by reason of the fact that there may be some additional viewers far away in another market. In my 26 years of experience, I have never encountered any such increased price. The only time CATV audiences are discussed is when a buyer seeks to depress the price of a program because a part of his potential audience has already been exposed to the same program or series by CATV.

A. Frank Reel.

Subscribed and sworn to before me this 19th day of June 1975. ROBERT L. GROSSMAN, Notary Public.

June 30, 1975.

Hon. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: As reported in the trade press, it appears that cable television witnesses who testified before your Subcommittee on June 11th may have generated some erroneous impressions relative to the value which a station derives from extension of its signal to cable subscribers residing beyond the station's normal over-the-air coverage area. I hope this letter will serve to correct these impressions.

To the best of our knowledge, WGN-TV is currently carried on 170 cable television systems whose subscribers total 576,000. Approximately 142 of these systems, with a total of 490,700 subscribers, are located beyond the Chicago Area of Dominant Influence. This area, known as the ADI, represents these counties wherein the Chicago television stations have a proponderance of television viewing.

Without going into detail regarding the methods used in the buying and selling of television commercials, I would like to advise you that the price of advertising purchased on our station reflects only the home we reach within the Chicago ADI. We do not receive extra consideration by virtue of these homes beyond the ADI which are reached via cable television.

I will be pleased to discuss this further with any members of the Subcommittee or their staffs.

Sincerely,

SHELDON COOPER.

MCA TV, New York, N.Y., July 10, 1975.

Hon. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: I have been advised that cable television witnesses appeared before your committee last month and claimed that television stations pay higher copyright royalty fees to copyright owners because television signals are carried by cable systems into additional homes.

television signals are carried by cable systems into additional homes.

As Executive Vice President and Director of Sales for MCA TV (a major distributor of copyrighted programs to television), I have a great deal of experience in selling our programs to television. I cannot recall a single negotiation in which the number of cable subscribers in a market was an issue or factor in price of the product. When I am negotiating a contract with a local television station for the use of our programs (syndication), I have no idea of the number of cable homes in that local market, and today I couldn't tell you, if you asked me, the numbers of cable homes in any market.

The reason simply stated is that the number of cable households viewing a television program is irrelevant in our negotiations with television stations. In determining a sale price and negotiating with a local television station we analyze the following, the past history of selling programs in that particular market; the ranking in size of that market (New York is No. 1, etc.); competition in selling programs to stations in the market; our costs in the programs we're attempting to sell; and the needs of a television station for programming. Thus, for example, if a television station has a low rating, and we have what we think is a good program which will help his ratings, we may ask a higher price. The station may pay the higher price, if it needs our program, for just that reason. The sale price has no relationship to the number of increased cable viewers: it is based on the marketplace.

If increased cable subscribers had an effect on the contracts we negotiate, then as the number of cable viewers increased, our sale price should also increase. This has not happened in the case of films we sold on a syndication basis in December 1972 in comparison with the sales of films in the same markets in January 1969. Following is a table showing the approximate changes in 1972 sales prices over 1969 prices in the fifteen largest television markets that had from 3% to 19% cable household penetration:

Market:	cha	Percentage change in price	
New York	_~~	+3	
Los Angeles			
Philadelphia			
Boston			
San Francisco		-16	
Washington, D.C.		same	
Pittsburgh			
Cleveland			
Dallas-Ft. Worth		+3	
Minneapolis-St. Paul		-40	
Houston		-11	
Seattle-Tacoma		same	
Atlanta			
Indianapolis		-4	
Tampa-St. Petersburg		-1	

During this period, television homes increased nationally by almost 9% and cable subscriber households increased nationally by 66%. Additionally, during this same period there was a continuing, high rate of inflation. Yet in those few markets where we obtained price increases for our product, the increases ranged only from 3% to 6%. Indeed, in most of those markets, we experienced no changes in prices or else reductions ranging from 1% to 40%. While such price changes can be explained in part by the quality and number of films offered for syndication, it is obvious that the number of cable viewers has no effect upon the price negotiated. What counts is the program we offer and the specific market-place situation.

I must add that the "leasing" of copyrighted program material involves complex issues; it is not the same as selling bolts and nuts. I have touched only on the high points and have perhaps oversimplified in the interest of brevity. I would be pleased to make myself available for a fuller explanation and to respond to any questions you and the Members of the Subcommittee might have. I must repeat, however, that neither I nor any other seller of program material to a television station, that I know of, has ever obtained more money because of additional cable system coverage of that buyer's signal.

Respectfully.

KEITH GODFREY.

UNITED ARTISTS TELEVISION, INC., New York, N.Y., July 7, 1975.

Hon. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: The undersigned is the Chairman of the Board and Chief Executive Officer of United Artists Television, Inc. My company is actively engaged in the distribution of motion picture feature films and series to television stations throughout the United States. I am writing this letter to comment on testimony given by witnesses for the cable industry at last month's hearings before your Subcommittee regarding the license fees paid by television stations for copyrighted programs.

I am fully familiar with the distribution of motion picture feature films and series to television stations, having been actively engaged in that business since 1950. My activities in this respect included and still include the negotiation of license contracts with networks and television stations. One of the important subjects of these negotiations is, of course, the price which the licensee pays. In my experience, there is no increase in price which the television station will pay because of cable retransmissions. The reasons why the station will not pay a higher license fee are inherent in the operation of the television program market. Indeed, where licenses to networks are concerned, the network acquires the rights for the whole United States, and it would not pay more money for cable retransmissions, especially since the network's affiliated stations are

faced with competition for their own local spot commercials when the same programs are imported by CATV with the local spot commercials of the distant station.

Insofar as licenses to stations for non-network (syndicated) showings are concerned, it is perhaps a platitude to say that price is determined by what a buyer is willing to pay and what a seller is willing to accept. But the reality of the marketplace is that many factors enter into this determination, particularly in view of the intangible and speculative element of public response to a particular program or group of programs. Cable carriage enlarging distant

audiences plays no part in that price determination at all.

The primary determining factor in arriving at the amount of license fees is supply and demand. When there are more stations in the market, there are more bidders for the program and, accordingly, the price will be higher. Other factors influencing the price are the availability of programs for licensing to stations in that market and the need of the station for the particular program or type of program offered to it. This in turn depends on licenses recently offered

or granted in the market by competitors of the program supplier.

For the reasons explained, it is misleading to say, as I understand cable interests have done, that the copyright owner is being reimbursed for his losses in local markets by additional payments by stations for distant signal retransmissions by CATV. The contrary is true. The copyright owner loses local sales to stations without being able to recoup his losses from the stations whose signals are carried to the distant markets.

Respectfully yours,

ERWIN H. EZZES.

GATEWAY COMMUNICATIONS, INC., Cherry Hill, N.J., July 9, 1975.

Hon. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHARMAN: My attention has been called to certain testimony made by spokesmen for cable systems during the hearings on copyright legislation

before your Subcommittee.

Cable protagonists have stated, unequivocally, that cable so enhances the quality of local signals and so extends local signals beyond normal coverage areas that local stations benefit from the added coverage, and therefore cable systems ought not to pay copyright fees, but on the contrary, they should collect fees from local stations to compensate the cable systems for improving and extending television signals.

That claim is preposterous.

In certain locations it is possible that local signals have been "enhanced" but when it happens it is an improvement less apparent to the eye and mind than to the meter of the measuring device. In my area of operations, the television signal may be extended for the cable viewer in Williamsport, or in similar physically shaded areas where normal station signals cannot be received. This is the classic cable situation.

But the argument is wholly fallacious that this "service" by the cable systems permits the station to charge more for its advertising and thus enables the

syndicator to charge more for his copyrighted program.

Virtually all television advertising buying is done on the basis of station reception in what Nielsen calls the *Designated Market Area*, and the American Research Bureau calls the *Area of Dominant Influence*. These are the areas in which the stations in a market command the attention of a majority of the viewers (county-by-county) and is, as a practical matter, well within the coverage area of the station's unassisted signal.

Each DMA (ADI) is defined by viewer response to television stations in a market. From an advertising selling viewpoint, much of a station's unassisted signal is "wasted" because it is broadcast over areas where a majority of tele-

vision sets are tuned to stations operating in an adjacent market.

The Johnstown/Altoona area offers an excellent case in point, when one considers the degree of cable saturation—nearly 55%—and the number of cable connections—about 150,000. In combination, the Johnstown/Altoona market becomes the biggest and toughest cable market in America.

"Television Fact Book" shows that the Johnstown television station, WJAC-TV, has a net weekly circulation approaching 600,000 television homes. The Altoona station has a net weekly circulation of under 300,000 homes. But, "Broadcast Advertiser Reports" (the authoritative source on TV advertising), shows that most national business is placed on the Altoona station, WTAJ-TV, despite the fact that Johnstown has a two to out total coverage over the Altoona station.

Superior selling may account for some of the difference, but the simple fact is that most buying is done on DMA or ADI figures and in the DMA or ADI, the Altoona station, WTAJ-TV, in a majority of time periods, has the audiences equal to or larger than the Johnstown station.

On the other hand, the Johnstown stations physical coverage over Pittsburgh is "wasted" in the sense that advertisers buying the Johnstown/Altoona market also buy the Pittsburgh market sep rately; they buy by DMA or ADI and not by total coverage of the station.

The local merchant doing business in Johnstown or Altoona has no desire to pay more advertising dollars to reacl, viewers in Pittsburgh; his store is in Johnstown or in Altoona, and he'll not pay more for a signal that competes with the signals used by Pittsburgh merchants—who are "local" merchants for Pittsburgh area residents.

Where and how does cable help the Johnstown/Altoona television stations? The answer is that cable doesn't help them; it hurts. There has been no ABC-TV affiliate in either Johnstown or Altoora. Cable brings in to bota cities the signal of WTAE-TV in Pittsburgh, a station that is 75 to 100 miles away from Altoona and the area served by its station. The Pittsburgh station can't sell this coverage, but the viewers watching the programs, obviously, are not watching the signals of the Altoona or Johnstown stations. Consequently, these audiences for the Altoona and Johnstown stations are diminished rather than increased. In short, cable has fractionalized the local viewing audience.

Or, look at Biughamton, New York, and audience survey records going back to November 1963. The share of audience viewing signals other than those in the market has risen from 2% in November of 1963, to 25% in May of 1975, and it has gone as high as 30%. The total number of homes attributed to the Binghamton market has gone from 43,000 in November of 1963, to 51,000 in November of 1966 but sharply down to 38,000 in May of 1975. In a time when the number of television homes was increasing and the population was increasing, the Binghamton stations have had to run at full speed in order to remain in approximately the same place. The reason? The growth of cable systems in the area, systems that import three signals from New York City 200 miles away and additional signals from Syracuse and from Wilkes Barre—Scranton.

The total homes here cited is from 9 AM to midnight, 7 days a week. The primetime situation is even more revealing. In 1963–1965, the number of homes viewing the three Binghamton network stations ranged around 90,000. At the height of the last television season, 1974–1975, the number had dropped to as low as 69,000.

On the purchase of syndication copyrighted product for use on television stations, the distributor prices each market according to its size. From that point on, the price the station pays is negotiated.

Prices for copyrighted programs are negotiated on the basis of competition between sellers, on what a station operator feels he can afford, on the going price in the market for similar programs, on the quality of the product under consideration, on the number of stations in a market, on the length of time that the program has been available. These are along the more important factors that are the determinants of price for program material; not the size of the station's audience. Thus, the DMA or ADI is seldom, if ever, a measure of price paid and the total service area is of even less significance in such price discussions.

The syndicator may sell the same product in adjacent markets—the Pittsburgh/Johnstown/Altoona situation again. If he sells the same program in the two markets and the Pittsburgh station is carried by cable in Altoona and Johnstown, one may find that the Pittsburgh station is taking away audience with the same program for which the Altoona station has paid good dollars. At the same time, the Johnstown/Altoona audience is an audience that the Pittsburgh station cannot sell in formulating its rates. Meanwhile, the Altoona station is forced to sell at a lower rate because the program coming into the market via cable has eroded part of the Altoona station's audience.

Cable's claim that its enhancement of local signals and its extension of those signals in additional homes should make it exempt from copyright payment is not based on the facts and is not deserving of serious consideration, in my judgment.

Sincerely,

GEORGE A. KOEHLER.

Richard Woollen, being duly sworn, deposes and says:

I make this affidavit so that it may be submitted to the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary of the House of Representatives in connection with its hearings on the bill H.R. 2223.

I am Vice President in charge of Programming for Metromedia Television. In that capacity it is my duty to purchase syndicated and other television properties for the six television stations owned and operated by Metromedia, Inc. These stations are WNEW-TV, Channel 5 in New York; KTTV, Channel 11 in Los Angeles; WTTG, Channel 5 in Washington, D.C.; WTCN-TV, Channel 11 in Minneapolis-St. Paul; KMBC-TV, Channel 9 in Kansas City; and WXIX-TV, Channel 19 in Cincinnati. KMBC-TV in Kansas City is an affiliate of the ABC Television network, the others are independent stations. WXIX-TV in Cincinnati is a UHF station—the others are VHF stations.

I have been engaged in the process of purchasing programing for the Metromedia owned and operated stations for over 9 years. During that time I have never been moved to increase the price of any programing by reason of the fact that signals of our stations are carried into distant areas and disseminated by CATV. Nor have I been part, to any negotiations for the purchase of programing which were based in any way upon a consideration of the fact that our stations' audience includes coverage of distant areas by cable.

A discussion of the fact that our signals are carried on cable systems has never arisen in any negotiations for any programing—that I have conducted.

RICHARD WOOLLEN.

Subscribed and sworn to before me this 23rd day of June 1975.

ARNOLD L. WADLER, Notary Public.

GOLDEN WEST BROADCASTERS, Los Angeles, Calif., July 14, 1975.

Hon. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Libertics and Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I have been asked as General Manager of KTLA, an independently owned television station in Los Angeles, California, to comment on whether or not we consider the number of cable subscribers to whom our programs are carried in determining the price we will pay for programs which we acquire from other parties.

In my experience, the question of the number of cable subscribers has never been an element in determining the price paid for such programs, nor is it an element in determining the prices we charge our advertisers for advertising on our station. This is so for primarily two reasons. The cable television audience is so negligible in comparison to the total available audience that it is not measured in considering prices charged or prices paid.

In addition, the rating services which report the number of viewers a particular station has within its area of dominant influence in order to afford comparisons with other stations, do not include in their calculations or statistical research a separate number for cable viewers. The advertising rates we charge are based on the reports of such statistical surveys. Since the number of cable viewers is not included in the statistics, it is not an element in the determination of advertising rates.

I can remember no instance in which the number of cable viewers ever became a subject of a pricing discussion with a motion picture product supplier, or in any discussion of our advertising charges with a potential advertiser.

Yours very truly,

JOHN T. REYNOLDS.

NATIONAL ASSOCIATION OF BROADCASTERS, Washington, D.C., November 26, 1975.

Hon. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: I am in receipt of your recent letter requesting the comments of the National Association of Broadcasters regarding the proposal of the Teleprompter Corporation of an alternative method of treating the issue of cable television copyright in H.R. 2223. Coming as it does, at the eleventh hour of consideration of this complex issue, we are forced to admit that it is difficult to explore it in depth. But we do appreciate your affording us the opportunity to respond and hope that our observations are of some help in your deliberation.

The Teleprompter proposal is eye-catching, at first blush, because it incorporates two figures which make it seemingly reasonable—the percentage broadcasters pay for copyright, and a quantitative measure of audience garnered by those signals for which Teleprompter would deign to pay. Its cosmetic allure, however, is quickly lost when the real facts of this proposal are brought to light. It is based upon dubious assumptions—assumptions which appear in Teleprompter's memorandum as allegations of fact without intellectual or even narrative support. To the extent that these assumptions are deficient, so is the proposal itself.

1. The Assumption That "Local" Signals Ought to be Exempt from Copyright Liability

Teleprompter alleges that "as a matter of pure logic, there is no justification for imposing liability on cable's recransmission of local signals." Unfortunately, Teleprompter's definition of "pure" logic is that logic which occurs in the vacuum of ignorance. A reasonable definition of a local signal, for purposes of copyright, has escaped all who have tried to establish it throughout the long history of this bill's consideration. Teleprompter, in its memorandum, seems to be speaking of a local signal as that which either is available over the air, or which falls within the intended market of advertisers promoting their product on television. In its proposed statutory language, however, the definition of local signals takes on an entirely different cast becoming not what the term "local" engenders in the mind of the reader, but rather signals which are "required to be retransmitted by the cable system pursuant to the rules and regulations of the Federal Communications Commission." In the statutory language, therefore, the exemption would attach whether the "local" signal was five miles distant or 200 miles. Clearly, in the case of a television signal retransmitted by a cable system beyond the market for which an advertiser sought coverage, there is no payment made to a broadcaster and no payment is passed on to a copyright proprietor for the use of his copyrighted material.

Broadcasters are not unmindful of the fact that in limited instances, there are cable systems which do provide additional and otherwise unobtainable coverage within the advertising base of the local broadcaster and provide a benefit, however limited, to that broadcaster. Such cases, however, represent a minute fraction of the broadcast audience, at the present time, and are likely, by virtue of the nature of early cable's development, to represent an ever decreasing fraction. In part it was because of this situation, coupled with the difficulty of equitably defining different classes of signals, that the compulsory license came in consideration in the copyright bill. After years of debate, and with less than total intellectual honesty, it ill behooves one party in the cable industry to offer a radically-altered design for the payment of copyright fees, especially when such proposal raises deep questions regarding areas which have been compromised and resolved during that long process of consideration.

2. The Assumption That "Retransmission of Distant Broadcast Signals Actually is a Benefit to the Originating Stations"

Teleprompter argues that originating stations whose signals are imported into distant markets are able to charge advertisers for the additional reach provided by cable television. This allegation is contrary to virtually all of the evidence supplied to the Subcommittee both in direct testimony and in subsequent communications from knowledgeable individuals. As a starting point, it ought to be observed that one-half of the sales revenue of the average television station is derived from local advertisers. Obviously with regard to that portion of advertis-

ing, Teleprompter's argument is ludicrous. With regard to the other fifty percent, national and regional advertisers buy time based on those homes located within the Area of Dominant Influence of the local broadcast station. As a practical matter, an advertiser is simply not interested in homes beyond that ADI and will not pay for them.

I am taking the liberty of attaching letters from a group of broadcasters which outline the practices of national advertisers and hope that their experience will be instructive to the Subcommittee in this matter.

3. The Assumption That "The Entire Nation is 'Local' to the Network"

Teleprompter asserts that a copyright owner who sells his product to the network assumes that the entire nation will view his product and is compensated on that basis. Once again, the Teleprompter proposal ignores certain realities of the broadcasting industry and, additionally, views the entire copyright system

with a certain degree of tunnel vision.

First, advertisers who buy network advertising buy only those homes delivered by the stations which carry the program. Each network's advertising rates are determined by the number of ...mes the network reaches and generally no consideration is given to cable homes in that computation. If a network does not have an affiliate within a specified market, no charge is made to an advertiser for the homes in that market whether or not cable television brings in an affiliated station from a distant market. Additionally, in the wide range of instances in which individual stations refuse to "clear" network programming, no charge is made to advertisers for those markets. Therefore, the amount of compensation flowing to a copyright proprietor is not based on the entire nation's viewing his product but rather on a more specific basis.

Second, the Teleprompter proposal ignores the fact that distant network signal importation, as well as distant independent importation, tend to fragment markets in such a way that the pool of dollars available for copyright payments for all programs is necessarily diminished. The importation of a distant network signal, which competes with a local network signal, reduces the audience of that local station. This reduces the amount of revenues derived by the station both from local advertising sales during network programming and from its compensation by the network for the audience it delivers for network programming. This reduction in revenue, caused by cable fragmentation, reduces the amount of money available to compensate the proprietors of programs run outside of the network schedule. It is precisely because of this kind of subtle impact on the copyright system that the compulsory license system was employed and continues to make good practical sense.

The National Association of Broadcasters continues to believe that the purposes of the copyright law would best be served by the enactment of a bill which incorporates the provision of the "Consensus Agreement." The Teleprompter proposal represents another attempt by the cable industry to move farther away from that Agreement. The Consensus Agreement, including the notion of a compulsory license for cable systems, represented a compromise with traditional copyright liability. That compromise remains the best hope for an equitable resolution of this difficult issue.

Thank you for the opportunity to reply to this proposal.

Respectfully yours,

JOHN B. SUMMERS, Executive Vice President and General Counsel.

Enclosures.

KSTW TELEVISION CHANNEL 11, Tacoma, Wash., June 19, 1975.

Hon. Robert Kastenmeier,

Chairman, Subcommittee on Courts, Civil Libertics and Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: I have followed with interest press accounts of hearings by your subcommittee on the question of copyright liability by cable television. A major contention put forward by cable interests is inaccurate, and should be corrected before your committee begins its deliberations.

The cable people have attempted to create the impression that, by carrying television signals beyond the area a TV station would normally cover itself, cable expands the station's effective market. This, they say, enables the station to

charge higher advertising rates, which in turn results in higher copyright payments, I do not deny that most station operators wish this were the case. Many of us have even labored to achieve that very goal. But the fact of the matter is that il doesn't work that way, nor is it likely to in the foreseeable future.

Television advertising rates are determined by the size and composition of the station's audience. There are only two generally accepted means of measuring that audience, and those are the regular audience surveys, or ratings, issued by the A. C. Nielsen Company and the American Research Bureau. Both those companies will admit that they cannot accurately credit to each station the viewing

it may receive on every cable system far from the station's home market.

Even if the rating services could, and did, fully and accurately credit such "outside" viewing, the station's advertising rates would not automatically rise in a commensurate amount. About half of an average station's revenues comes from local advertisers, retailers in the station's home community. Additional viewers hundreds of miles away are not a market for them, and they will not pay higher rates for the privilege of exposing their messages to these far-away people. The other part of station advertising revenues come from national advertisers, whose products presumably are available almost everywhere. But even they won't pay higher rates for that possible extra audience, because their buying concepts and criteria are based on the audience delivered in the so-called "Area of Dominant Influence," or that area close in to the station's home market.

I realize that this is a highly detailed and technical concept, but it is necessary to understand it in order to refute the cable interests' simple assertion that because of their additional coverage, broadcasters are charging higher rates and

paying additional copyright fees. That just isn't so. I hope you will call this to the attention of the committee's membership and staff, so that complete information can be elicited. Thank you very much for your time and consideration.

Sincerely,

CRAWFORD P. RICE, Vice President and General Manager.

> METROMEDIA TELEVISION, New York, N.Y., June 26, 1975.

Hon. ROBERT W. KASTENMEIER, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: During your recent hearings on CATV Copyright before your Subcommittee, witnesses representing Cable Television have presented testimony concerning the sales value of out-of-market homes reached . by television stations via cable. Our experience, which does not confirm the cable viewpoint presented, may be helpful to your consideration of this matter.

Metromedia Television operates six television stations, five of which are inde-

pendent—that is not affiliated with any major network.

Both local and national spot advertisers in the past have not had any significant interest in reaching any distant home outside of the market which may be receiving their message via cable. If indeed they were interested, they have not been willing in the past to pay higher rates for any additional viewing homes.

In fact most local advertisers are interested only in reaching viewers in the metropolitan area in which they conduct their business recognizing that cus-

tomer potential from distant homes is minimal at best.

National and regional advertisers plan their advertising expenditures in spot television based on the ADI (Area of Dominant Influence.) Therefore, cable homes falling outside the ADI simply are not a factor in the price they are willing

to pay.

The cable coverage also has no bearing on the price that stations pay for its programming. Just like the national advertises, the program syndicator establishes his price based on the size of the market not on the individual coverage of one station or another due to the number of cable systems on which that station is carried.

If I can be of further assistance, please do not hesitate to call on me.

Very truly yours,

R. KENT REPLOGLE, President.

June 27, 1975.

Hon. CHARLES E. WIGGINS, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN WIGGINS: Mr. John Mercer of your office has contacted me for additional details concerning out-of-market homes reached by television stations via CATV. He was particularly interested in the relationship of advertising

rates to film program costs because of the out-of-market coverage.

As previously stated advertisers will not pay for these out-of-market homes. Local advertisers have no interest in people located far from their retail area. National advertiser's buying concept is based on those homes located in the home market of the station (ADI). Additionally there is no accurate way to credit a station the viewing it may receive on a cable system. For example, last year KTVT carried the World Football League Games. Our signal was blacked out by the cable system in Monahans, Texas, because the local station was also carrying the telecasts. This may have happened on other cable systems of which we are not aware. Because of this local station protection, we cannot be sure which of our programs are being carried on cable. This uncertainty further precludes advertisers from paying additional money for cable coverage. Therefore, our advertising rates have not increased because of cable coverage. And, in fact, if cable coverage were eliminated the rates would remain the same since this coverage in no way affects our pricing which is based on the home market viewing audience (ADI).

Nor does cable figure in the price we pay for film program costs. Film distributors base the price they charge for their product on the market rank. The market price for film in Dallas-Ft. Worth, the eleventh television market, will be less than the price in Washington, D.C.... the 9th market, but greater than the price

in Houston, the 14th market.

I hope this additional information will be of help in your deliberations.

Thank you very much for your interest.

Kindest personal regards.

JAMES R. TERRELL, Vice President/General Manager.

INDEPENDENT TELEVISION STATIONS, INC., New York, N.Y., June 17, 1975.

Hon. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

Dear Chairman Kastenmeier: It is my understanding that during last week's hearings on CATV copyright before your Subcommittee, witnesses representing the cable television industry presented testimony concerning the sales value of out-of-market homes reached by television stations via CATV. Hopefully, the following information will be of assistance to you in your deliberations.

It is true that the Association of Independent Television Stations (INTV) has sought to interest advertisers in purchasing those out-of-market cable subscribers reached by independent television stations. As depicted in this week's issue of *Broadcasting* magazine, the cable industry actually displayed copies of

the coverage maps which INTV uses in its sales presentation.

However, it is significant that advertisers will not pay for these out-of-market homes. First, local advertisers have no interest in buying homes at such a distance. Second, national and regional advertisers are interested only in those homes located within the market (this area is known as the Area of Dominant Influence (ADI)). Homes outside the station's ADI simply do not figure in the price of the advertising. It may be that in certain cases an advertiser may select an independent station over a competing network affiliated station owing to the extens' nof the independent's signal via CATV. But this factor does not affect the price which the advertiser pays for the station's time, be it an affiliated or independent stat' in, and it does not affect the price the tation pays for its programming.

The foregoing information was confirmed in discussions with several other members of our association, located in both large and small markets. If I can be

of further assistance, please do not hesitate to call on me ca the President of our Association, Mr. Herman Land, at the above address.

Very truly yours,

JIM TERRELL,

Board of Directors,

Association of Independent Television Stations.

June 30, 1975.

Hon. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: As reported in the trade press, it appears that cable television witnesses who testified before your Subcommittee on June 11th may have generated some erroneous impressions relative to the value which a station derives from extension of its signal to cable subscribers residing beyond the station's normal over-the-air coverage area. I hope this letter will serve to correct these impressions.

To the best of our knowledge, WGN-TV is currently carried on 170 cable television systems whose subscribers total 576,000. Approximately 142 of these systems, with a total of 490,700 subscribers, are located beyond the Chicago Area of Dominant Influence. This area, known as the ADI, represents those counties wherein the Chicago television stations have a preponderance of television

viewing.

Without going into detail regarding the methods used in the buying and selling of television commercials, I would like to advise you that the price of advertising purchased on our station reflects only the homes we reach within the Chicago ADI. We do not receive extra consideration by virtue of those homes beyond the ADI which are reached via cable television.

I will be pleased to discuss this further with any members of the Subcommittee or their staffs.

Sincerely,

SHELDON COOPER

WASHINGTON, D.C., November 14, 1975.

Hon. Robert W. Kastenmeier, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Although NBC did not testify directly on the issue raised by the recent Teleprompter proposal, it is, as you know, a matter of great interest within the broadcasting industry. We have examined the proposal and find it defective in several important aspects. I have enclosed a copy of our analysis in the belief that it may be of assistance to you in your deliberations. Best wishes,

BOB HYNES.

STATEMENT OF NATIONAL BROADCASTING CO., INC., ON PROPOSAL OF TELEPROMPTER CORP. PROPOSING AMENDMENTS TO SECTIONS 111(d) (e) OF H.R. 2223

National Broadcasting Company, Inc. ("NBC") respectfully requests that these comments relating to the amendments to the Copyright Revision Bill (H.R. 2223) recently proposed by Teleprompter Corporation be made part of the record of this Subcommittee's hearings.

The Teleprompter proposal would substantially alter Section 111 of the pending bill. That Section has, of course, been the subject of extensive debate and controversy for many vears and for this reason NBC seriously questions whether it would be productive at this stage to introduce still another new element into this dispute. NBC, which has long believed that cable should be subjected to the same copyright liability as any other user of creative property, must also question why, as a matter of policy, the Congress of the United States should be asked to make a distinction or reable that is inconsistent with the overall objectives of copyright.

The Teleprompter proposal would, if adopted, impair to an even greater degree the concept that copyright owners are entitled to remuneration for the use of their property and for that reason alone, NBC opposes it. In addition, when the proposal is subjected to close scrutiny, it becomes apparent that it discriminates against certain types of cable systems and also against certain classes of copyright owners. In addition, the proposal would create serious administrative problems since there is not now in existence any reliable way to obtain the data on which the Teleprompter formula is based. In short, the proposal seeks to give certain cable systems a complete windfall at the expense of copyright owners, smaller cable systems and local broadcast stations, without serving any com-

pelling public policy.

Specifically, NBC has three fundamental objections to the Teleprompter proposal. First, it would impose the duty to pay copyright royalties only on those cable systems that import a limited kind of distant signals and leave other systems with virtually no liability to copyright owners. Second, the Teleprompter proposal would consider as relevant to the payment of copyright royalties only the share of total programming costs expended by local broadcasters, thus excluding the most substantial television program costs, namely, the prices paid by networks to their program suppliers. Third, the Teleprompter formula is inequitable and poses serious problems of administration.

THE TELEPROMPTER PROPOSAL IS UNFAIR TO CERTAIN CABLE OPERATORS

The Teleprompter proposal discriminates against certain types of cable systems, particularly those which carry broadcast signals to remote and inaccessible areas. The copyright royalties paid by such systems would increase dramatically. For example, under the royalty schedule embodied in Section 111 of H R. 2223, NBC estimates that the system serving Carlsbad, New Mexico would pay approximately \$1,000 quarterly. Under the Teleprompter proposal, the same system would be paying approximately \$5,000 quarterly.

would be paying approximately \$5,000 quarterly.

It is obvious that under the proposed H.R. 2223 royalty fee schedule, urban systems such as Teleprompter Manhattan would pay large compulsory licensing royalties since the fee would be based on gross revenues from subscribers. Interestingly enough, under the Teleprompter proposal, a system like Teleprompter Manhattan would not pay a penny in copyright royalties unless it decided to import a distant nonnetwork signal into its service area which—given the substantial number of broadcast signals already available in that market—is

unlikely.

The proposed amendment thus discriminates against classes of cable operators and the discrimination bears absolutely no relationship to the amount of use of copyrighted material by the cable operator.

THE TELEPROMPTER PROPOSAL IS UNFAIR TO COPYRIGHT OWNERS

NBC strongly opposes Teleprompter's position that cable systems should pay copyright royalties only for imported distant signals. Teleprompter is really asking that the Subcommittee return to ground zero and reverse itself on two subjects that have been extensively debated—first, whether a cable system may carry network programs without paying any royalties, and second, it is the a cable system may carry local programs without paying any royalties NBC supports the approach which is currently embodied in Section 111 of H.R. 2223.

Any fee formula or fee schedule that Congress adopts should provide for license payments to all owners of all copyrighted works that are carried under the compulsory license. It is ironic that Teleprompter still seeks a compulsory license permitting a cable system to retransmit simultaneously all network and local programs carried by stations in the cable system's local service area. Yet, it takes the position that the owners of copyrights in those works should not be paid royalties. The Teleprompter proposal thus discriminates among classes of copyright owners. Indeed, it would permit only a very limited number of copyright owners to receive royalties. License fees would be paid only to owners of copyrighted works performed on programs originated by broadcasting stations and even this class would not receive any fee. mless a distant cable system imported the program. We suggest that adopting the Teleprompter proposal would raise a serious Constitutional question with respect to the compulsory licensing provisions. All owners who are compelled to license their copyrighted property should be entitled to share in the compulsory license fees.

¹ Since the bulk of network programming is licensed by the networks from outside program suppliers, it is these suppliers and the creative people they deal with who would suffer the greatest harm under the latest Teleprompter proposal.

THE TELEPROMPTER FORMULA IS INEQUITABLE AND EXPENSIVE

NBC opposes the formula that Teleprompter has devised because the formula is inequitable and would be expensive and burdensome to administer. NBC criticizes the elements of the formula proposed by Teleprompter because those elements do not reflect the economic value to the cable system of the programs carried under the compulsory license.

The second element of Teleprompter's formula, for example, provides that gross revenues from subscribers would be multiplied by the percentage of broadcasting revenues spent on programming by broadcasters, but not by the percentage spent by networks. Networks expend a much higher percentage of gross revenues on

programming and such costs should be included in any formula.

NBC strongly objects to the third element in the Teleprompter formula which Teleprompter terms an index of "popularity". In order to analyze the third element of the Teleprompter formula, it is important to recall that Teleprompter proposes to pay copyright royalties only for imported distant signals, based on a ratio of county-wide viewing rather than merely viewing to the CATV system. One need only consider the following example to determine the type of inequitable result which would result under the proposed formula. Take the case of a system having 1,000 subscribers located in a county with 10,000 television homes which imports a distant signal which in turn is viewed by 10% of the cable subscribers. Applying the formula proposed by Teleprompter to determine the "market share" of the distant signal, would produce a market share of 1 percent not 10 percent. since the 90 percent of noncable homes obviously cannot watch the distant signal. The Teleprompter formula would dilute the "popularity" in cable homes of the imported signal because of the existence in the county of 9,000 television homes, not one of which could view the distant signal.

not one of which could view the distant signal.

NBC agrees that "popularity" may be a significant factor, but the popularity that is relevant is the popularity of the broadcasting signals carried by the cable operator in relation to all other material carried by the cable operator. Where the cable system does nothing other than transmit network and independent television programming to subscribers, the value of the compulsory license must be extremely high. Absent such license, the cable operator simply has nothing to sell to subscribers. In contrast, where a cable system sells for its basic monthly charge not only boosted broadcast signals, but also alternative programming, the value of the compulsory license should be adjusted to reflect the relative popularity to cable subscribers of the broadcast signal and the alternative programming. A formula in which such popularity could be reflected would provide copyright royalties more directly related to the value to the cable operator of carrying

copyrighted works.

It should also be noted that the information required for the third element of the Teleprompter proposal is not presently compiled by the Federal Communications Commission or by any independent rating or survey service. Although Arbitron publishes at irregular intervals out-of-date information on certain county viewing, these reports do not contain information about viewing of individual programs. The Teleprompter formula requires such information. Gathering the necessary data to compute the third element in the Teleprompter formula would be extremely expensive and may well pose significant administrative problems to the Federal Communications Commission, which Teleprompter charges with the responsibility.

OTHER COMMENTS ON SECTION 111

NBC recognizes that the Subcommittee might decide to retain a fee schedule in Section 111(d). The royalty fees provided for the initial period under Section 111(d) are in the opinion of NBC inordinately low. These royalty fees were established at a time when the majority of cable operators were independent cable systems with low annual gross revenues. That is not the case today. 3C believes that cable systems with large gross revenues related primarily to the carriage of copyrighted material should not have the benefit of a statutory freeze on royalties at a rate of 2½ percent.

The Subcommittee may find that there is some merit in adopting a combination of a statutory fee schedule and a formula. Under such an approach, the initial fee schedule could remain unchanged for cable systems with gross revenues of up to \$160,000 and a formula could be specified for computing the royalties pay-

able by cable systems having gross revenues in excess of \$160,000. NBC would favor a formula that was certain in application and inexpensive. For example, the licensing fees payable by the larger cable systems could be computed by multiplying gross receipts from subscribers by the percentage of total network and broadcasting revenues spent on network and local station programming costs.

For the reasons set forth above, we oppose the proposals of Teleprompter and urge that the compulsory licensing fees be revised to reflect the economic value of the works licensed to cable operators.

We appreciate this opportunity to present our views to the Subcommittee.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Mission, Kans., November 14, 1975.

Congressman Robert-Kastenmeier,

U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I have your letter of November 4, 1975, inviting me to comment on behalf of the National Collegiate Athletic Association on amendments proposed by Teleprompter Corporation to the royalty provisions of Sections 111 (d) and (e) of H.R. 2223.

The injury to college and high school athletic programs and the limitations on the access of intercollegiate sports to broadcast television which results from widespread cable retransmission of distant signals of intercollegiate sports events, and of professional football telecasts described by Section 3 of Public Law 87-331, cannot be mitigated or adequately compensated for by any royalty system.

The solution to the problems which I discussed in my testimony before the Subcommittee on Courts, Civil Liberties and the Administration of Justice must lie in specific limitations on cable carriage of such sports events. The necessary limitations may be imposed either directly by H.R. 2223, or by the Federal Communications Commission pursuant to an express authorization in the bill. Any such authorization should direct the Commission to take account of (1) the impact of cable carriage on attendance at concurrent school/college events, and (2) public policy expressed by Congress in Section 3 of Public Law 87-331—considerations which the Commission has apparently once again refused to recognize in its November 4 action denying petitions for reconsideration of its recent rule-making regarding cable carriage of sports event broadcasts.

The NCAA, and individual NCAA member institutions in collegiate conferences do, however, have a potential interest in the royalty provisions of the bill, and although that interest pales in comparison with the NCAA's principal concern regarding cable retransmissions of sports events, it is sufficient to impel me to accept your invitation to comment on the merits of the Teleprompter Corporation's proposal. That proposal is faulty in several respects, including the following:

1. Contrary to Teleprompter Corporation's assertions, it is neither logical nor equitable to exclude cable system's retransmissions of so-called local signals (the definition of which Teleprompter would make completely open-ended) from the royalty payment requirements. Cable system appropriate such signals and sell them at a profit to subscribers just as they do in the case of so-called "distant" signals, and they should be required to pay a reasonable royalty to the copyright owners of the programming concerned.

2. The proposed exclusion of copyrighted "networks" programming is merely a device for minimizing the royalty payment obligation—no rational basis for such an exclusion is advanced, and it would be inequitable and discriminatory as to those program suppliers who are successful in "networking" their property.

The proposal is also obscure at a number of important points and does not even mention any reason for the proposed deletion of several elements of the Bill's definition of cable system gross revenues.

For these reasons, although it might deserve further consideration if it were to include in the royalty base retransmission of all broadcast signals and to contemplate payment for all copyrighted programming retransmitted, I am compelled to conclude that, as presented by Teleprompter Corporation, this "compromise" is no compromise at all, but merely an ingenious device for absolving

cable system of responsibility for any meaningful royalty payment. I submit, therefore, that the Teleprompter Corporation proposal should be rejected by your subcommittee.

In closing I must reiterate that it is the NCAA's hope and urgent request that you will propose an amendment to H.R. 2223 which will make provision for the imposition of limitations on cable retransmissions of sports events necessary to protect high school and college athletic programs.

Sincerely yours,

JOHN COPPEDGE.

NATIONAL CABLE TELEVISION ASSOCIATION, Washington, D.C., November 14, 1975.

Hon. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: This is in response to your letter of November 4, asking for our thoughts on the cable television copyright payment plan advanced by TelePromptTer Corporation for inclusion in H.R. 2223.

As you know, NCTA has consistently expressed its willingness to support a bill which provides for a reasonable copyright payment for the carriage of

broadcast signals.

The key to NCTA's support of H.R. 2223 is the phrase "reasonable copyright", as we stated in our testimony of June 10 before your subcommittee. In the bill as presently written a CATV system would pay a progressive percentage of its gross subscriber revenues from the basic reception service. The fee schedule set in the bill would be subject to periodic review by a tribunal. NCTA testified in support of the payment plan but took strong exception to the tribunal arbitration mechanism on the ground, among others, that this is an arbitrary system without criteria or adequate review which is therefore fraught with danger and uncertainty for the cable industry.

On the subject of the fee schedule itself, NCTA recognized that H.R. 2223's payment plan is based solely on gross revenues. This approach disregards the local or distant source and the number of broadcast signals carried by a CATV system. From the standpoint of logic, NCTA has always been, and still is, attracted to a concept of paying only for signals not normally received in the community. Local signals are already present off-the-air in the community and the copyright owner has been compensated for distribution of his product. Likewise, a CATV system carrying one distant signal should not have to pay as much as a CATV system carrying five distant signals. We have heretofore been unable to formulate a fair method of apportioning payment along such local signal versus distant signal lines.

TelePrompTer has submitted a new method of calculating a CATV system's copyright liability. It is based on payment solely for each distant signal carried, a concept which, as indicated above, appears to be logically sound, but needs further review. Rather than the usual arbitrary assumptions found in other payment plans, this proposal attempts to track market place factors in calculating the fees to be paid by a CATV system. The built-in features of the plan seem to provide ascertainable standards for tribunal fee review. Thus, NCTA is studying the plan and we are presently engaged in a thorough scatistical and economic analysis of all of its facets. We will be happy to provide your committee with our findings when our research has been completed.

Sincerely,

REX A. BRADLEY, Chairman of the Board.

MAYER, BROWN & PLATT, Washington, D.C., November 13, 1795.

Mr. Robert W. Kastenmeier,
Chairman, Subcommittee on Courts, Civil Libertics and the Administration of
Justice, Committee on the Judiciary, House of Representatives, Washington,
D.C.

DEAR MR. KASTENMEIER: Mr. David O. Wicks, Jr., of Becker Communications Associates, has asked me to respond to your letter of November 4, 1975, inviting

a submission of views with respect to a proposed alternative method of dealing with the computation of copyright royalty payments in H.R. 2223. We have been able to review the proposal only on its face and have not been able to project the actual economic impact of the proposal on the cable industry. Such a study would involve a review of the financial results of individual companies and information as to their plans for the importation of distant non-network programming, the market share of such programs, and the average programming cost of cable television systems.

Nevertheless, we are able to conclude that the proposed alternative, to the extent it would eliminate the possibility of changes in the royalty rate by action of a copyright tribunal, will have a more predictable effect upon the operations and profitability of cable television systems. The elimination of this uncertainty

should improve financing opportunities fo ich systems.

As noted in Mr. Wicks' testimony, wever, any copyright royalty of the magnitude provided in H.R. 2223 will have a significant adverse effect upon the profitability of most cable systems and must be regarded as having a potentially inhibiting impact upon their growth prospects.

We appreciate this opportunity to make these comments upon the alternative

proposal referred to in your letter.

Very truly yours,

CHARLES W. PETTY, Jr., Counsel for Becker Communications Associates.

> TELEPROMPTER CORP., New York, N.Y., November 14, 1975.

Hon. ROBERT W. KASTENMEIER,

Chairman, House Judiciary Eubcommittee on Courts, Civil Liberties and the Administration of Justice, Rayburn Building, Washington, D.C.

DEAR MR. CHAIRMAN: We are taking this opportunity to amplify the copyright proposal we previously submitted to your Committee.

In particular, we would like to address the criticism that our formula is overly complex. We strongly believe that this criticism is unjustified for two reasons:

First, the formula is not in fact complicated. It involves only two simple calculations, both of which depend upon data which is either readily available or can be easily obtained. Attached hereto is an example, using one of our own systems, of how our formula works.

Second, the simplicity of H.R. 2223 as it now stands is deceptive. The simple formula contained in H.R. 2223 required periodic adjustment from a Royalty Tribunal—which almost certainly ensures periodic litigation. Then, too, if for some reason either House of Congress overrode a determination made by the

Tribunal an extremely uncertain and difficult situation would exist.

The simple formula of H.R. 2223 is deceptive for another reason as well—it gives absolutely no guidance as to how to distribute the royalty payments. The present bill (in Section 111(d)(3)(A)) rather wistfully contemplates that an ASCAP-like organization will develop to remedy this omission. But what if one does not? Or if all copyright owners do not join the same organization? Or if, as in fact happened in the case of ASCAP, some members claim that the distribution scheme utilized by the organization is unfair?

Moreover, the present bill gives absolutely no guidance as to how the Royalty Tribunal (which in the absence of agreement among the claimants will be required to make the fee distribution) should perform its distribution function. Probably the tribunal will use, as do ASCAP and BMI, the relative popularity of copyrighted programs as the basis for distribution. Any other result would he absurd since it would not relate the payment received to the value of the

work created.

This, however, would not solve the problem since it is likely that the localdistant signal controversy will once again erupt—this time among the copyright owner claimants. That is, copyright owners whose programs are carried on imported independent stations will object to sharing the cable royalties with the copyright owners whose programs are broadcast locally on the perfectly reasonable ground that the local broadcast station has already adequately compensated the copyright owner for the local cable viewership. Perfectly reasonable,

to be sure—but how is the tribunal to respond when the argument runs counter to the entire philosophy of H.R. 2223?

We believe that our proposal would give the statutory guidance necessary to solve these distribution problems. First, of course, because it adopts the logical local-distant (as well as network-non-network) distinction, it immediately solves the question of who are the proper claimants. Second, because the formula is itself based on the popularity of the imported programming it is much more consistent with what we envision will necessarily have to be the mechanism of the distribution arrangement.

We also wish to address the question of whether Teleprompter's formula disadvantages smaller, rural systems in favor of larger urban systems.1 We are right now doing a complete analysis of this matter and will be able to give your committee a definite answer to this question in a short time. For now we merely observe that this problem, if it exists, can easily be remedied by adopting an exclusion which would be applicable only to small independently owned systems. Such a proposal would have only a minimal impact on the total copyright fees collected from the cable industry but would go far toward winning the support of the small independent operators.

Very truly yours,

RUSSELL KARP.

Example

Teleprompter's system in Farmington, New Mexico had revenues of \$563,072 in 1974. The system, which is located in San Juan County, New Mexico, imported the following distant independent television stations which received the respective market shares indicated below:

Station:	Market share Percent
KTTY	_ 2.8
KCOP	1.3
KHJ	$\tilde{2}.\tilde{2}$
KTLA	1.8
	- 1.0
KNME	9
Total	9.0

We have proposed that copyright liability be determined by the following formula:

Subscriber revenues x percentage of revenues which broadcast stations spend on programming x popularity of imported independent and non-network programming as expressed as a market share percentage.

Applying the Farmington data to our formula (and assuming that all broadcast stations spend 28 percent of their revenues for programming costs*) results in a copyright fee of \$14,189.41 (2.5% of subscriber revenues). This result is derived as follows:

\$563,072×28%×9%=\$14,189.41

¹ It should be remembered that rural systems which are able to import many television stations are often much more profitable than the larger urban systems. Teleprompter's Manhattan and Los Angeles systems lost \$11,350,000 in 1974 while many of our smaller systems were extremely profitable.

2 Such as excluding the first \$160,000 of system revenues from copyright liability.

3 We have attached a page from Neilson which shows the market shares of each of these stations in San Juan'County.

4 We have attached a copy of the FCC's summarization of the Forms 324 filed for 1074 from which the 28 percent figure is derived.

from which the 28 percent figure is derived.

County and State name	3 cycle sample	TV household (hundreds)	Market name	Station	Average other household viewing	Share
Sandoval, N. Mex	20	42	Albuquerque	KGGM	333	27.4
	20	42	do	KNME	63	5. 2 31. 0
	20	42	do	KOAT	376	31.0
	20 20	42	do	KUB	, 441 1, 213	36. 4 100. 0
San Juan, N. Mex	103	134	Denver	KOA	1, 213	100.
	103	134	do	KWGN	Ŝ	. 1
	103	134	Roswell	KBIM	5 4	1
	103	134	do	KSWS	3	.1
	103	134	El Paso	KDBC	1	-
	103 103	134 134	Grand Junction-Monta Albuquerque	MGCM	28 1,128	27.2
	103	134	Mondaeidae	KIVA	1, 120	27. 2 26. 0
	103	134	do	KNME	38	28.9 7.9 1.3 2.2
	103	134	do	KOAY	1, 198	28.9
	103	134	Los Angeles	KOB_	328	7.9
	103	134	Los Angeles	LALLING KCOP	53	1.3
	103 103	134 134	do	KHJ	91 76	2. 2
	103	134	do	KITV	113	2.8
	103	,04			4, 147	100.0
San Miguel, N. Mex	25 25	52	Albuquerque	KGGM	7608	37. 6
	25	52	do	KNME	_15	1.0
	25	52	do	KOAT	527	-32. €
	. 25	52	_,do	KOB	463 1,613	28. 8 100. 0
Santa Fe, N. Mex	25 73	160	do	KGGM	1, 485	33.3
	73	160	do		1, 247	33. 3 5. 6
	73 73	160	do	KOAT	1, 272	28.6
	73	16.	do	КОВ	1, 194	· 26.8
	73	160	Los Angeles	LLLLL KCOP	72	1.6
	73	160 160	do	KHJ	, 47 41	1. l . 9
	73 73 73	160	do	KTTV	91	2.1
	73	200			4, 449	100.0
Sierra, N. Mex	21	37	El Paso		46	4. 6
	21	37	do		27	2.8
	21	37	do	KISM	137	14.0
	21	37 37	Albuquerque	KGGM	325	33. 2 3. 4
	21 21 21 21 21 21 21 21	37 37	dodo.	KOAT	33 223	22.7
	21	37	do		188	19.3
	21	0,	**************************************		979	100.0
Socorrd, N. Mex	14	23	Roswell		2	. 2
	14	23	Albuquerque	KGGM	246	35.,€

Source: From Neilson survey ratings.

APPENDIX 2

This appendix 2 consists of the 18 briefing papers submitted by the Copyright Office and referred to in the testimony of the Register of Copyrights on May 7, 1975.

BRIEFING PAPERS ON CURRENT ISSUES RAISED BY H.R. 2223, MAY 7, 1975

Introductory note

The collection of briefing papers in folders 2-19 included in this portfolio are intended for the practical guidance of the members of the House Judiciary Subcommittee. Their sole purpose is to pinpoint issues and to provide general information about the way the bill deals with those issues. The papers are not intended either as a complete summary of the contents of the bill or as a thorough analysis of the distory, theoretical basis, or construction of particular provisions.

of the nistory, theoretical basis, or construction of particular provisions.

The following staff members of the Copyright Office, listed in alphabetical order, have contributed to the compilation, writing, editing and preparation of this material: Barbara Acosta, Catherine Armstrong, Gloria Jean Burke, sharon Butler, Wilma Favis, Carol Duling, Lowis Flacks, Marybeth Peters Gingery, James Hanav..., Linda Hutterly, Dennis Jeffries, John Kent Dunlap, Kevin Maricle, Mary Middleton, Stephen Plichta, Rachel Ray, Barbara Ringer, and Dorothy Schrader.

CHAPTER 1, SECTIONS 101-105

SUBJECT MATTER OF COPYRIGHT

Summary

Under the Copyright Clause of the Constitution, Congress is empowered to grant to authors the exclusive rights in their writings. The present copyright law, as adopted in 1909, repeats the Constitutional phrase and grants copyright to "all the the writings of an author." Although the broad sweep of this phrase may imply that the statutory copyright grant is co-existensive with the Constitutional power, it is clear that Congress has not exhausted the scope of "writings of an author" in the existing law.

The revision bill substitutes the phrase "original works of authorship" for "writings of an author" as a clarification that the Constitutional power has not been exhausted in copyright legislation. The new phrase also more accurately reflects the variety of authorship covered by the copyright status. It also dispenses with the term "writing" which, in ordinary statutory parlance, could be given a more limited meaning, but in fact has been broadly interpreted by the courts to apply to works such as paintings, sculpture, photographs, motion pictures, and sound recordings.

The standard of original, creative authorship would not be changed by the revision bill. Choreographic works and pantomimes, however, would be covered

explicitly.

The bill continues and clarifies the principle of existing law that copyright in new versions covers only the new material and does not enlarge the scope or dura-

tion of protection in pre-existing works.

The section on national origin extends statutory protection to unpublished works without regard to the nationality or domicile of the author. Published works of foreign nationals are eligible for United States copyright protection if they meet one of four conditions.

Section 101: Definitions

For the sake of convenience, the definitions of terms used in two or more sections throughout the bill are compiled in the first section. Provisions dealing with specialized subject matter, such as section 111 on cable retransmissions and section 116 on jukebox performances, include their own definitions subsections.

Section 102: Copyrightable subject matter

Original works of authorship.—Section 102 provides that copyright protection subsists in original works of authorship fixed in tangible form. While seven broad categories illustrative of "works of authorship" are listed, it is clear that the categories are illustrative and not limitative. It is intended that the standards of originality and creativity developed by the courts under the existing law should remain unchanged by the revision bill. The copyright standard of originality is modest and does not approach the novelty standards of the patent law.

Fixation.—The requirement of fixation is retained and will serve as the dividing line between common law and statutory copyright under the revised law. Unfixed works, such as spontoneous oral conversations or unrecorded dances, are left to common law protection. Under the definitions in section 101, a work is "fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord... is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."

Pantomimes and choreographic works.—A special comment is in order on the reference to pantomimes and choreographic works in the revision bill. The present law has no specific provision for copyright in choreographic works, although they are undoubtedly protected as "dramatic works." The same is true of pantomimes. To resolve any doubt as to the necessity for dramatic content as a condition for protecting these recognized art forms, the bill mentions them explicitly.

Ideas, systems, etc.—Subsection (b) of section 102 states the fundamental principle that copyright protection does not extend to ideas, plans, systems, or methods, no matter how unique the concept. This proviso was added as a result of the debate over the copyrightability of computer programs, and is intended to make clear that, although the programer's "literary" expression, as embodied in a program, would be copyrightable, his ideas, system, and methodology would

not.

Section 103: Con. ". tions and derivative works

Section 103 specines another fundamental principle: that copyright may subsist in new versions or compilations using pre-existing materials, but that the new copyright extends only to the new authorship. Copyright cannot extend to any part of a work based directly on pre-existing materials that was used unlawfully.

Section 104: National original

In general section 104 restates the present law with respect to eligibility of foreign nationals to enjoy copyright under United States law. Subsection (a) provides that unpublished works are subject to protection irrespective of nationality or domicile. Under present law, most unpublished works are protected by common law, and the common law makes no distinction based on nationality or domicile. The revision bill makes this a statutory principle with respect to unpublished works.

Under subsection (b), published works are subject to copyright if one of four conditions is met:

- 1. The author is a U.S. national or domiciliary, or a national of a country with which we have entered into a bilateral or multilateral copyright agreement; or
- 2. The work is first published in the United States or in a foreign country that is a member of the Universal Copyright Convention; or 3. The work is a publication of a designated international organization; or
- 4. the work comes within the scope of a Presidential Proclamation; the President issues a Proclamation on the basis of a finding that the foreign country accords our authors substantially the same protection as that country accords its own authors.

As interpreted by the courts, the present law extends protection to works by stateless persons, regardless of where the author is domiciled or where his work is first published. Section 104 does not achieve this result, and Congress may wish to consider a revision for this purpose.

Subsection (c) of section 104 is intended to fureclose U.S. courts from sanctioning an expropriation by a foreign government or governmental organization of an author's rights. It is likely that the principle of this provision exists in our law presently, although it has not been definitively tested. Another, possibly better, approach to this question would be to include a general provision against involuntary transfers in Chapter 2.

CHAPTER 1. SECTIONS 106, 109

SCOPE OF EXCLUSIVE RIGHTS

Summary

The section setting forth the exclusive rights of the copyright owner is the heart of any copyright law. On the theory that copyright is a creature of statute, the exclusive rights section determines the limits of protection granted to authors and their successors in interest. This is especially true under section 1 of the Act of 1909 (the present copyright law) since the exclusive rights and limitations on their scope are stated in the same section.

The structural stress of an outmoded law is also felt most keenly here. To the extent that the courts have stretched the limits of statutory language, our "ancient" 1909 law has been made serviceable in the face of technological change. To the extent that the courts have not been able to do this (for example, in the case of cable television and photocopying), we are left with a turn-of the-century statute in the age of computers, communications satellites, and space travel. The United States has one of the oldest copyright laws of any civilized country and nowhere is this demonstrated more graphically than in the exclusive rights sections.

Section 106 of the revision bill would recast the exclusive rights provisions of the law in broad, simple terms. The right to display a work publicly would be added specifically. Detailed limitations on the broad exclusive rights follow in sections 107 through 117. With one exception, these sections are dealt with in separate briefing papers. Section 109 is discussed here, since it expresses the fundamental distinction between rights in a copyrighted work and a physical object embodying that work.

Section 106: Exclusive rights in copyrighted works

General analysis.—The fundamental rights of the copyright owner under the revision bill are the rights (1) to reproduce the work in copies or phonorecords, (2) to prepare derivative works (new versions), (3) to distribute copies or phonorecords publicly, (4) to perform the work publicly in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works, and (5) to display the work publicly in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work. Sections 107 through 117 state the limitations on these exclusive

Reproduction in copies of phonorecords.—The right to reproduce the work is the most fundamental right granted by any copyright law. As defined in section 101, the term "phonorecords" describes the physical reproductions of sound recordings, and the term "copies" describes any other physical embodiment of a

copyrightable work.

'The terms "copies" and "phonorecords" include the first or original physical embodiment of the work (the prototype), as well as any other objects from which the work can be "perceived, reproduced, or otherwise communicated, either di-

rectly or with the aid of a machine or device."

Preparation of derivative works.—The right to prepare new versions of copyrighted works is a valuable one, and its existence permits the copyright owner to control uses of his work that might not otherwise be included in the reproduction right. The derivative work right covers the right to adapt, translate, abridge, revise, dramatize, and generally to cast the copyrighted work in a multitude of new forms.

Public distribution.-Together with reproduction of copies, the right to make copies available to the public comprises the most basic right of the copyright owner. The right includes distribution by sale, gift, or other transfer of owner-ship of the material object embodying the work, or by rental, lease, or lending the material object. This right, among others, is qualified by section 109, discussed below.

Public performing right.—For certain kinds of works, the right of public performance has become the most important of the copyright owner's bundle of rights. The revision bill eliminates the blunderbuss approach of the present law, which establishes an ambiguous, all-or-nothing dichotomy between public performance for profit and not for profit. Under the existing statute, public performance of musical works and nondramatic literary works is within the copyright owner's control only if the performance is "for profit." Section 106 of the bill states the public performing right without qualification and applies to literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works. Definitions of "perform" and "publicly" appear in section 101.

The public performing right affords protection against a variety of acts, that constitute a performance of a work, including face-to-face live renditions, renditions from recordings, broadcasting, retransmission by loudspeakers, and transmissions or retransmissions by cable. Each act, if done publicly, is under the general control of the proprietor, but that control is subject to the limita-.

tions specified in sections 107 through 117.

Right of public display.—This right is the only one granted under the revision bill whose existence is open to question under the present law. The other exclusive rights though limited in one way or another, have been part of our law at least

since 1909.

The right to display a work in public should be unstinguished both from the right of reproduction and from the right to perform the work publicly. By definition in section 101, to "'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." Thus, subject to the limitations discussed below in connection with section 109, the right of public display applies to any work embodied in manuscript or printed matter and in pictorial, graphic, and sculptural works, it cluding "stills." Exhibition of a motion picture or other audiovisual work as a whole is a performance rather than a display.

Section 109: Effect of transfer of copy or phonorecord

This section draws a basic distinction between the rights of a copyright owner and the rights of someone who owns a physical object (a "copy" or "phonorecord") that embodies a copyrighted work. In particular, subsection (a) makes clear that, once a copy or phonorecord has been lawfully made, it can be disposed of by its owner without the copyright owner's permission. Similarly, under subsection (b), the owner of a lawfully-made copy can display it public to viewers present at the same place as the copy.

FAIR USE; NONPROFIT EDUCATIONAL AND RESEARCH USES

Summary

Under the present law, "fair use" is a judicially created limitation on the exclusive rights of the copyright owner. It generally covers incidental use of a part of a work for socially laudable purposes. Whether a particular use will be considered "fair" or not depends upon all of the circumstances surrounding the use and the nature of the copyrighted work.

The revision bill in section 107 codifies this judicial doctrine in general terms. "Fair use" has special relevance to nonprofit educational and research activities. The bill also creates specific exemptions for educators and scholars with respect to library photocopying, instructional broadcasting, and classroom uses. Section 504(c)(2) permits the courts to remit any statutory damages for an infringement by an instructor, librarian, or archivist in a nonprofit school who proves that he acted out of the reasonable belief that the use was excused as "fair."

Background

Although fair use is an important limitation on the exclusive rights of copyright owners, there never has been a "fair use" provision in any U.S. copyright statute. The doctrine has been developed by the courts and is firmly established.

It is conceded that "fair use" is not susceptible of exact definition. Generally speaking, however, it allows copying without permission from, or payment to, the copyright owner where the use is reasonable and not harmful to the rights of the copyright owner. It has been generally considered that, since "fair use" is such an important limitation on the rights of the copyright owner, the statute should mention it and indicate its general scope.

Beginning with the House hearings in 1965, educational users have sought broader and more explicit exemptions than those embraced in the general concept of "fair use." The original House Judiciary Committee report on the bill contained an extensive discussion of the various classroom activities that could be considered "fair use" and free of copyright control, and this language has been retained for the most part in succeeding legislative reports (see pp. 115–120 of S. Rept. No. 93–983, 93rd Congress, 2d Session). In addition, an ad hoc group of educational organizations have been seeking a general exemption for nonprofit uses for teaching, scholarship, and research; their proposal is discussed below.

Section 107: Fair use

Section 107, the "fair use" section, is purposely somewhat vague, since it would be difficult to prescribe precise rules to cover all situations. It refers to "purposes such as criticism, comment, news reporting, teaching, scholarship, or research" and specifies four factors to be considered in determining whether or not a particular use is fair. Section 107 as drafted is intended to restate the present judicial doctrine; it is not intended to change, narrow or enlarge it in any way. The four criteria were included in the statute to give guidance to the courts and to users, but they are not intended to be determinative.

Section 107 makes it clear that fair use can extend to reproduction of copyrighted material for classroom use. Educational uses, as is true of all other uses, will be judged on the basis of the applicable criteria and the facts of the particular case.

Section 110, Clause (1): Face-to-face teaching activities

Clause (1) of Section 110 is intended to set out the conditions under which performances or displays, in the course of instructional activities other than broadcasting, are to be exempt from copyright control. This clause covers all types of works. Thus, a teacher or student would be free to perform or display anything in class as long as all of the other conditions are met. He could read aloud from a copyrighted book, act out a play, or display a copyrighted photograph.

To be exempt the performance or display must be by an instructor or a pupil. "Instructor" would generally mean a teacher but it is intended to be broad enough to cover a guest lecturer or the like. Performance by actors, singers or musicians brought in from outside of the school would not be exempt. "Pupils" is intended generally to mean the enrolled members of a class.

"Face-to-face" was inserted to exclude broadcasting or other transmissions, whether radio or television, or open or closed circuit, from an outside location into a classroom. The exemption does, however, extend to the use of devices for amplifying or reproducing sound and for projecting visual images, as long as the instructor and the students are in the same area. "Teaching activities" is intended to mean systematic instruction; it would not include performances or displays that are given for the recreation or entertainment of any part of the audience. This is true even though the work performed or displayed has great cultural or intellectual appeal.

The phrase "classroom or similar place" limits the exemption to places devoted to instruction. The 1967 House Committee Report and its successor indicate that a "similar place" might be a studio, workshop, gymnasium, or library as long as it actually is used as a classroom for systematic instructional activities. Performances in an auditorium for a school assembly, a graduation exercise, a class play, or a sporting event would be outside the scope of this exemption because the audience is not confined to members of a specific class, although they might be exempt-

ed under other provisions of section 110.

Section 504(C)(2): Innocent educational infringement

Another exemption important to educators is found in section 504(c)(2); it insulates educators who infringe innocently and was included because it is often difficult for educators to ascertain the boundaries of infringement. Where a teacher proves that he acted innocently and in good faith, believing a reproduction of copyrighted material to be a fair use, the court is given discretion to reduce the statutory damages for infringement, or to remit them entirely. This would help protect teachers who are uncertain about the specific effects of the copyright law and should diminish the discomfort some educators have felt concerning the vagueness of the criteria governing fair use.

Proposed nonprofit exemption

In the course of Senate hearings in August 1973 on S. 1361 (93rd Congress. 1st Session). the Ad Hoc Committee on Copyright Law Revision proposed that a new section be added to the revision bill as a further limitation on exclusive rights. The text of the 1973 proposal is as follows:

Section. Limitations on exclusive rights: Reproduction for teaching scholarship and research

Notwithstanding other provisions of this Act nonprofit use of a portion of a copyrighted work for noncommercial teaching, scholarship or research is not an infringement of copyright.

For purpose of this section

- (1) "use" shall mean reproduction, copying and recording; storage and retri val by automatic systems capable of storing, processing, retrieving, or trensferring information or in conjunction with any similar device, machine or process;
- (2) "portion" shall mean brief excerpts (which are not substantial in th in proportion to their source) from certain copyrighted works except that it shall also include

(a) the whole of short literary, pictorial and graphic works

- (b) entire works reproduced for storage in automatic systems capable of storing, processing, retrieving, or transferring information or in conjunction with any similar device, machine or process, provided that
 - (i) a method of recording ratrieval of the stored information is established at the time of reproduction for storage, and

(ii) the rules otherwise applicable under law to copyrighted works shall apply to information retrieved from such systems;

(o) recording and retransmission of broadcasts within five school days after the recorded broadcast; provided that such recording is immediately destroyed after such 5-day period and that such retransmission is limited to immediate viewing in schools and colleges.

Provided that "portion" shall not include works w" h are

(a) originally consumable upon use, such as workbook exercises, problems, or standardized tests and the answer sheets for such tests; (b) used for the purpose of compilation within the provisions of

Section 103(a).

It is possible that this or a similar proposal may be made again during the

House hearings.

The arguments in favor of this exemption stem from a belief that section 107 is too vague and that it leaves educators with few practical guidelines. Educational representatives argue that education is vital to America and therefore all efforts to strengthen and enrich our educational system should be supported. They stress that educators should have maximum availability of all kinds of teaching materials and resources, and that teachers have no time to obtain the requisite permissions. They argue that if a teacher must obtain permission he will not use the particular work and the students will suffer.

On the other hand, authors and publishers argue that the specific mention of uses such as "teaching, scholarship or research" in section 107 already presents a potential danger to their rights. They point out that further intrusion in their rights in the form of a blanket nonprofit exemption would present a genuine danger to the creative impulse. Many works are created and published specifically for the educational market, and a broad nonprofit exemption would probably cut off a large part of the revenue needed to induce creation. They suggest establishment of a clearinghouse for licensing educational materials in the case of uses beyond section 107.

CHAPTER 1, SECTION 108

REPRODUCTION BY LIBRARIES

Summary .

Related to the seneral question of the extent to which the "fair use" doctrine should operate as a limitation on the exclusive rights of the converget proprietor is the specific issue of exceptions for library reproduction of copyrighted works, principally by photocopying. The extent to which the "fair use" doctrine is applicable to absolve libraries from liability for various types of photocopying is not at all clear under the present law. Since the Court of Claims decision in the Williams & Williams was extremely limited in scope, and the case ended with an even split by the Supreme Court it as not the considered a significant provident.

even split by the Supreme Court, it cannot be considered a significant precedent. Section 108 of the revision bill represents an effort to provide a partial legislative solution to this most difficult issue. It covers libraries serving the public or specialized researchers, and it extends only to reproduction or distribution made without any commercial purpose. Single photocopies may be made from books and periodicals for purposes of scholarship and research under certain conditions, but the library must not engage in the related or concerted reproduction of multiple copies or in "systematic" reproduction. Musical works, pictorial, graphic or sculptural works, and motion pictures, or other audic-visual works (not including news programs) can be reproduced only for archival or replacement purposes, or under the limited "fair use" doctrine codified in section 107.

General considerations

The purpose of copyright protection has been to encourage authors and creators to make their material available for the benefit of society by granting them certain exclusive rights for a limited time. These exclusive rights include the making of copies of the work, and the publishing; or distributing of these copies.

For many years scholars and researchers have felt free to copy by hand or by typewriter from the works of others for their own private use, without securing permission from the copyright owner of the work. The practice has been tolerated because manual copying was so laborious and time-consuming that it was necessarily limited in amount and rarely if ever affected the economics of authorship and publishing.

Technological developments over the past thirty years in the fields of photocopying, microreproduction, and computers, however, have led to a proliferation of increasingly inexpensive machines for reproducing, storing, and transferring the contents of copyrighted works. Now, libraries may copy a complete volume in less time than it takes to try to locate printed copy or seek permission of the copyright owner to make the copy. Librarians argue that the copyright law must be flexible enough to permit them to utilize photocopying machines and the rest of the new technology to facilitate scholarship and research.

of the new technology to facilitate scholarship and research.

Authors and publishers, on the other hand, point out that if a library is allowed to provide photocopies without limit and in any quantity, even to individual users, the library essentially becomes a publisher. The economic base for authorship and commercial publishing would thus be placed in jeopardy. While authorship and publishing will need to make major adjustments to survive the tech-

nological revolution, it is argued that a reasonable copyright law is an essential condition to their survival.

Background

Legislative history.—The Register of Copyrights in his 1961 Report, suggested that the law permit a library whose collections are available to the public without charge to supply a single photocopy of copyrighted material in its collections to any user, if he states in writing that the intended use is solely for his own research or the material is no longer available from the publisher. A draft statutory provision to this effect was circulated for discussion, but was opposed by both

sides for exactly opposite reasons and was dropped from later drafts.

The 1967 House bill contained only a provision, in section 108, under which a "non-profit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research" would be entitled to reproduce "any such work in its collections" providing there was no "purpose of direct or indirect commercial advantage," and such copies were limited to "facsimile" reproductions. Following House passage of this bill the Senate Judiciary Committee, in 1969, considerably expanded the scope of this section. Libraries were permitted to make facsimile copies of published as well as unpublished works where needed to replace deteriorating, lost or stolen copies, if an unused replacement copy could not be obtained from "commonly known trade sources at a normal price." A library could also reproduce copies of material in its collections at the request of a user, if the user established to the Library's satisfaction that an unused copy could not be obtained and was for private study, scholarship or research. Library photocopying was limited to isolated or unrelated reproduction or distribution of a single copy, and the exemption would not extend to cases of related or concerted reproduction of multiple copies or photorecords. These provisions also appeared in the general revision bills introduced in the 92nd and 93rd C. zgresses.

During Senate hearings on July 31, and August 1, 1973, conflicting objections

were raised on both sides to the scope of section 108.

In the bill as reported by the Senate Judiciary Subcommittee in April 1974, section 108 was revamped once more. The result was a compromise: libraries would be able to reproduce, without major restrictions, a single copy of an article or other contribution in a periodical or a small part of any other copyrighted work, or of an entire work that is out of print. However, subsection (g) prohibits not only multiple copying but also the "systematic" supplying of single copies. This subsection in particular has drawn the ire of many librarians and library organizations, since it would affect inter-library loan arrangements and would limit "networking" among regional or other specialized libraries. In its report (S. Rept. No. 93-983), the Senate Judiciary Committee suggested that representatives of authors and publishers meet with library representatives to formulate photocopying guidelines and to develop workable clearance and licensing procèdures.

With these recommendations in view a Conference on Resolution of Copyright Issues was held on November 16, 1974, co-sponsored by the Copyright Office and the National on Libraries and Information Science. Additional meetings were held on February 5, 1975 and April 24, 1975. A working party has been appointed to study the problems and has twice reported back to the conference with recommendations. Both sides have reserved their positions on the liability of libraries for photocopying of copyrighted works under the present law, but are continuing to work toward the development of a workable licensing system.

Finally, the National Commission on New Technological Uses of Copyrighted Works (CONTU) was established on December 31, 1974 by Public Law 93-573, and is now awaiting Presidential appointment of its members. It has a mandate to study the photocopying problem in general (not only with respect to libraries), and to recommend legislative solutions to supplement the provisions of section

Judicial developments

In recent years a major confrontation between libraries and publishers developed over the question of library photocopying in the case of Williams & Wilkins v. United States, 487 F. 2d 1345 (Ct. Cl. 1973), aff'd by evenly-divided Supreme Court, 184 U.S.P.Q. 705 (1975). The plaintiff, a small, but major rublisher of medical books, and journals claimed that the National Institutes of Health and the National Library of Medicine had infringed its copyrights by photocopying articles, usually less than 50 pages in length from its journals without securing

permission and to the publisher's financial detriment. An extensive trial was held before a Commissioner in the Court of Claims, who found on February 16, 1972 that copyrights had been infringed by the staffs of the two government L'braries,

and the Government was liable.

By a 4-3 majority, the Court of Claims, in its opinion on November 27, 1973, rejected the Commissioner's finding and held that the photocopying practices of the two government libraries was "fair use". The Court restricted its holding to the specific type and context of use shown by the record, and explicitly stated that it was not ruling on other kinds of systems or uses of copyrighted materials in other institutions or in other fields. The court observed that the problems of photocopying badly needs Congressional treatment, since the 1909 Act gives almost nothing by way of directives and the judicial doctrine of "fair use" is amorphous and open-ended.

A petition for certiorari was granted by the U.S. Supreme Court and oral arguments were heard on December 17, 1974. Its opinion was anxiously awaited by both the library associations and copyright owners, but the Court divided 4-4,

thereby sustaining the Court of Claims without rendering any opinion.

ANALYSIS OF SECTION 108

Subsection (a): General scope of exemption

This subsection underpins the entire provision. It makes clear that the library photocopying exemption applies only to the making of single photocopies, without any profit motive, by libraries open to the public or to outside researchers.

Subsection (b)::Unpublished.manuscripts

Unpublished manuscripts and other works in the library's collections can be duplicated in facsimile form for preservation or for deposit for research use in another library or archive.

Subsection (c): Replacement

Where a work is out of print and the library's copy needs to be replaced, it can be reproduced in facsimile form

Subsection (d): Copies for users of articles and excerpts

Where a single copy is requested by a user for "private study, scholarship, or research," a library may supply, directly or through another library, a photocopy of "no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work."

Subsection (e): Copies for users of out-of-print works

Under the same circumstances provided in subsection (d), a library may supply a single photocopy of all or a substantial part of a work, if a copy of the work cannot be obtained at a "fair price."

Subsection (f): Exceptions

This subsection makes clear that, while a library is excused for any unsupervised infringing photocopying done on equipment located on its premises, the actual user of the equipment would be liable. Clause (3) states that section 108 is superdinated to the "fair use" doctrine of section 107 and to any existing contractual obligations. Clause (4) the so-called "Vanderbilt University" exception prescribes the right of libraries of archives to reproduce and distribute a limited number of copies of audiovisual news programs.

Subsection (g):1

This subsection ct, it states that, while the exemptions o lated reproduction of the same material on separate occa lated or concerted multiple copying, even when done over a period of time or for different users. And, more controversial yet, it forecloses the exemption to a library that "engages in the systematic reproduction or distribution of single or multiple copies or phonorecords."

Subsection (h): Material not covered

In general, the copying permitted for users does not extend to music, works of the graphic arts, and to motion pictures or other audiovisual works except those dealing with news.

CHAPTER 1, SECTIONS 110, 112

NONCOMMERCIAL BROADCASTING.

Summary

Section 110 deals with seven types of public performances and displays which, because of their noncommercial or special nature, are exempted from copyright liability. The most important of these involve face to face teaching activities, in folder 4, and instructional broadcasting. Not included among the activities exempted is "public broadcasting"—noncommercial broadcasting of a general cultural or educational nature to the public at large. The treatment to be accorded to this type of performance remains a major issue in the general revision bill.

Section 112 deals generally with so-called "ephemeral recordings"—usually one recording of programs made by a licensed broadcaster for delayed transmission or archival purposes. The issue arises with respect to the number of these recordings an unlicensed instructional broadcaster can make, and how long he can use them. The bill allows the making of 30 copies and their use for seven years, and the dispute is whether this goes too far or not far enough.

Background and general considerations

The present law exempts from the control of the copyright owner all performances of nondramatic literary and musical works that are not "for profit." A performance is generally considered to be "for profit" if it occurs with an expectation by the person causing the performance of direct or indirect commercial advantage or gain to be derived by it. Thus, a live performance of a non-dramatic literary or musical work for purely educational purposes is generally exempt under the current law. This is also true of the unsponsored performance of such works on instructional radio and television.

One of the most controversial issues earlier in the revision effort was whether or not to retain the "for profit" provision. The 1961 Report of the Register of Copyrights favored retention. In 1965, however, the Register modified his position. Because of the upsurge in both the number and importance of nonprofit performances especially nonprofit broadcasts reaching huge audiences, he indicated that the "for profit" exemption was too broad and its continuation would endanger authors' rights:

"Fully acknowledging the unique public value of educational broadcasting and its need for financial support, we must also recognize the large public audiences it is now reaching, the vast potential audiences that are awaiting it, and the fact that, as a medium for entertainment recreation and communication of information, a good deal of educational programming is indistinguishable from a good deal of commercial programming . . . It does not seem too much to ask that some of the money now going to support educational broadcasting activities be used to compensate authors and publishers whose works are essential to those activities." Supplementary Report of the Register on the 1965 Revision Bill, at 35.

Since 1965, the approach has been, therefore, to state the public performance right in broad terms in section 106 and provide specific exemptions for educational and other nonprofit uses in other sections.

Section 110 creates specific exemptions for instructional broadcasting and section 112 permits public broadcasters to make thirty recordings of programs incorporating nondramatic musical and literary works, and to retain them for seven years.

Public broadcasting has recently put forward a proposal to create a compulsory licensing system that would allow public broadcasters to perform and record nondramatic literary and musical works, and to display and record pictorial, graphic, and sculptural works, without permission but upon payment of a fee. The so-called Mathias Amendment, which was proposed last year as an amendment to S. 1361 but was not taken up by the Senate, would add a new section 118 to the bill for this purpose. While the proposal would utilize the Royalty, Tribunal concept in setting the compulsory licensing fees, it appears to be intended to serve mainly as a framework for private negotiation.

Analysis of section 110 (2)

Section 110 of the revision bill deals with performances and exhibitions that are now generally exempt under the "for profit" limitation. Clause (1) covers "face to face" teaching activities, and clause (2) deals with instructional broad-

casting. The section draws a line between instructional broadcasting, which is an adjunct to the actual classwork of educational institutions, and public broadcasting, which is intended for the enlightenment, edification or instruction of the public at large. It exempts "the performance of a nondramatic literary or musical work or display of a work by or in the course of transmission" if three conditions are met. The first is that the performance or display must be "a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution." The second condition is that "the performance or display is directly related and of material ass. ance to the teaching content of the transmission." The third condition is that the transmission must be made "primarily" for: "(i) reception in classrooms or similar places normally devoted to instruction, or (ii) reception by persons to whom the transmission is directed because of their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or (iii) reception by officers or employees of governmental bodies as part of their official duties or employment."

Under section 110, only performances of nondramatic literary or musical works would be exempt. The performance on public radio or television of a dramatic work, a dramatico-musical work such as an operator musical comedy, or a motion picture could occur lawfully only if the copyright owner's permission had been obtained. With respect to exhibitions, the exemption would apply to any type of work to which the right "to display ... publicly" under section 106(5) applies—that is, literary, musical, dramatic and choreographic works, pantomines and pictorial, graphic, or sculptural works, including the individual

images of a motion picture or other audiovisual work.

The 1967 Report and its successors indicate that, in subclause (A) of clause (2), "systematic instructional activities" is intended as the general equivalent of "curriculums" but that it could be broader in certain cases. A transmission would be a regular part of these activities if it conforms with the established teaching practices of the governmental body or educational institution. The term "educational institution" was used because it is broad enough to cover a wide range of establishments engaged in teaching activities. It is not, however, intended to cover "foundations," "associations," etc. who are not primarily and directly engaged with instruction. Subclause (C) requires that the transmission be made "primarily," and not necessarily "solely," for reception to the three groups specified. Thus, the transmission could still be exempt even though capable of reception by the public at large. Conversely, if a transmission is rimarily for reception of the public but is also received in classrooms, it is not exempt. The subject matter, content and time are factors to be considered in determining the "primary" purpose of a program.

Paragraph (i) of subclause (C) covers generally what are known as "inschool broadcasts" whether open or closed circuit. The reference to "classrooms or similar places" is intended to have the same meaning as that used in clause (1). Paragraph (ii) was included because educational broadcasters argued that one of their unique advantages over traditional teaching techniques is the ability to bring instructional material to members of the population who for various reasons cannot be brought together in classrooms, e.g., shutins and preschool children. Paragraph (iii) is intended to permit the use of copyrighted material in the course of instructional transmissions to Government employees

who are receiving training as part of their official duties or employment.

Analysis of section 112 (b).

Section 112(b) represents a response to public broadcasters' requests for special recording privileges. It permits a nonprofit organization that is entitled to transmit a performance or display of a work under section 110(b) to make not more than 30 copies or phonorecords and to use the ephemeral recordings for transmitting purposes for not more than seven years after the initial transmission. Thereafter, one copy or phonorecord may be preserved exclusively for archival purposes.

The Mathias and Bayh amendments

Two amendments on behalf of public broadcasting were put forward in the Senate during the last stages of consideration of S. 1361, the general revision bill in 1974. Neither was taken up at the time, but they are now under active consideration at the subcommittee level.

The amendment sponsored by Senator Mathias would add a new section 118 to the bill, creating a compulsory licensing system to use copyrighted nondra-

matic literary and musical works, and pictorial, graphic and sculptural works in the transmission of "public broadcasts." Public broadcasts are defined as trausmissions of "educational television or radio programs by or for noncommercial educational broadcast stations." Under this proposal the user would have to record in the Copyright Office a notice of his intention at least one month before the initial broadcast and thereafter at stated intervals, as prescribed by the Register of Copyrights.

No specific royalty is proposed; instead it is to be left up to the Copyright Royalty Tribunal to determine what is a reasonable royalty in particular cases. The Amendment also provides that the Tribunal may calculate the royalty on any method it finds most appropriate with respect to the type of the work and the nature of the use, and that it may be calculated on a per-use, per-program, prorated or annual basis. In certain instances the royalty may be negotiated, and this negotiated rate may be substituted for the rates set by the Tribunal.

The user is to deposit with the Register of Copyrights a statement of account and the total royalty fee; those entitled to receive royalty payments are to file a claim during the month of July. The rest of the provision generally follows

the other compulsory license sections in the revision bill.

A second amendment proposed by Senator Bayh, would remove the restrictions imposed in section 112(b) concerning ephemeral recordings. His proposal would grant an unlimited exemption to nonprofit organizations and governmental bodies to make copies of the programs they transmit and to distribute copies for transmission by other similar organizations. Thus, the seven-year period and the restriction of 30 copies or phonorecords would be removed.

Efforts are now in progress, under the auspices of the staff of the Senate Subcommittee on Patents, Trademarks, and Copyrights, to reach agreement on voluntary licensing arrangements that would accommodate the needs of public broadcasting. If successful, these discussions could alleviate the need for at least

some aspects of the Mathias and Bayh amendments.

CHAPTER 1. SECTION 111

SECONDARY TRANSMISSION; CABLE TELEVISION

Summary of the problem

The Chairman of the Federal Communications Commission has recently referred to copyright revision as cable television's "biggest bugaboo at all," which may be true. But there can be little doubt that the reverse is equally true, and equally regrettable. The copyright question may have stunted the growth of CATV, but the CATV issue certainly brought the general revision bill to a dead halt for several years. The issue is still far from completely settled, but recent developments make the prospects for an ultimate copyright solution

somewhat more hopeful.

Section 111 deals with other forms of secondary transmissions in addition to cable television, but the on-going controversy is focused on the latter. At present, much of the activities of cable television consists of the retransmission of copyrighted programing initially broadcast over the air. The present state of the law does not recognize these activities as infringing the exclusive rights of the copyright proprietor in television programming. Section 111 represents an attempt at a compromise under which cable systems would be subject to a simple compulsory license with respect to such secondary transmissions as may be allowed carriage under the regulations of the Federal Communications Commission.

This provision represents a significant departure from earlier proposals on this issue in the revision bill. It is premised upon a recognition that the cable television issue involves both copyright and communications questions, and that each must be considered in the context of the other. Section 111 also rests on the principle that, in combining copyright and communications policy, the public

interest in both spheres must be carefully evaluated.

The public interest in some form of copyright responsibility for cable television rests on the simple principle that the economic rewards of authorship are the surest and best way to encourage the kinds of individual creativity which makes for a vital culture, especially in the mass media. The principle underscored by the Communications Act of 1934 is the right of all Americans to adequate television and radio services at reasonable costs. Cable television is a striking example of the tangency between communications and copyright policies.

Background

Community Antenna Television, or cable television as it is now most often known (the initials CATV will stand for either), arose during the 1950's in response to the need for television service in certain areas, especially small communities lacking adequate television service for a variety of reasons. The dominant causes were usually either topographic irregularities which prevented satisfactory reception of otherwise available programming, or sheer distance from broadcast centers.

Often too small to support an advertising-based broadcast station, these areas frequently received no benefit from the expansion of the broadcast spectrum to include UHF frequencies, a policy adopted by the Federal Communications Commission to increase broadcast services on a nationwide basis. Until the advent of cable television, the only means available to such localities for obtaining high quality reception, or any reception at all, fell into two categories: expensive home antennas and cooperative, non-profit boosters, translators and repeaters.

Boosters, translators and repeaters merely served to extend the range of distant signals by picking them up at advantageous locations and retransmitting them over the air. Such devices, however, carried only a single channel and lacked

the capacity to evolve into true local broadcasting outlets.

The introduction of cable television into these underserved areas meant that in many cases a viewer could receive five or more channels. Not only could cable television provide at least three network signals, but a variety of independent stations as well. Unlike the passive repeating devices, CATV systems also possessed the capacity to become program originators, utilizing channels not used for retransmissions.

The very promise of CATV created concern over the impact of its activities on the nation's communications structure. In 1959 the FCC decline to assert jurisdiction over cable television systems, and for three years it appeared that the

industry would grow without regulatory controls.

In 1962, however, in an apparent about-face, the Commission took its first decisive step in the CATV area when it refused to grant a microwave license to an applicant who would have used the facility to transmit signals directly to a CATV system for ultimate distribution to subscribers. The basis for the decision was highly significant for our purposes: the Commission found that the importation of the distant signal into the rural area in question would have destroyed the marginally successful local broadcaster, who could not compete with imported programming. In so acting, the Commission was protecting the economic interests of broadcasters and their program suppliers who licensed them in exchange for copyright royalties. Its purpose was to support local broadcast services as a means of community expression, but its effect had copyright implications.

Expanding upon its decision, the Commission in 1965 applied uniform rules to all microwave carriers serving cable systems and expressed its intention to adopt regulations directly governing cable at an early date. Although the FCC adopted several orders governing cable television between 1965 and 1972, it was not until the Fourth Report and Order on Cable Television (1972), that a comprehensive

regulatory program emerged from the Commission.

During this period of debate within the Commission, State and Federal courts entertained numerous cases intended to determine whether cable television's retransmissions of copyrighted programming was a violation of the exclusive rights of copyright owners under the 1909 Copyright Act, or of proprietary interests protected at the common law of unfair competition. A series of unfair competition lawsuits came to naught. When copyright proprietors finally took up the battle the stage was squarely set for two key Supreme Court decisions exploring the question of whether cable's retransmission activities violated the exclusive right to authorize the public performance of works which had been licensed for broadcasting on a geographically limited basis.

In Fortnightly Corp. v. United Artists, Inc. 392 U.S. 390 (1968), the Supreme Court applied a "functional test" to determine whether cable systems were active "performers", subject to the Copyright Act's proscriptions, or whether they were passive "viewers" whose activities amounted to no more than doing for subscribers what those suscribers could legitimately do for themselves. In Fortnightly, the cable company was seen to fall on the viewer's side of the line.

Fortnightly, however, concerned the retransmission of signals which, in theory at least, were considered local to the area serviced by the defendant. The question of whether or not the same result would apply in situations involving the

importation of distant signals remained upon until early in 1974, when the Court decided C.B.S. v. Teleprompter Corp. In that case, the Court held that the importation of distant signals among other activities, did not change the essential nature of CATV operations under Fortnightly's "functional test." In both cases the Supreme Court made clear that it was required to construe the 1909 conyright law as it found it, and that it was up to Congress to remedy any resulting

injustice to copyright owners or unfairness to the public.

Legislative History.—The first revision bills submitted in 1964 and 1965 did not specifically treat the subject of cable television. During the extensive hearings on the bill, it became apparent that the copyright problem of cable was very serious, and that some provision would be required. As reported by the House Judiciary Subcommittee, the bill included long, detailed provisions seeking to govern carre's liability for secondary transmissions of primary transmissions embodying copyrighted programming. Like all of its successors, the provision was a compromise. Section 111 of that bill would have exempted from all liability systems that functioned merely as "master antennas" for local signals. There were distinguished from cable retransmissions where the system also originated programming, imported signals into areas already served by the networks, or imported programming for which a local conventional broadcaster already had secured a license from the copyright proprietor or originating authority. CATY systems which retransmitted signals into areas not already served by the major networks, would be permitted to do so upon payment of a "reasonable license

The feasibility of providing some form of compulsory license was explored during the House consideration of the bill. Rejecting the proposal, the House

Judiciary Committee Report noted:

Aside from the obvious difficulties of determining what the proper percentage would be and of allocating payments among an indefinite number of owners of copyrighted works of different types and values, it would be difficult to collect and distribute royalties equitably without establishing unacceptable Government controls or administration. The committee is opposed to any such system and sees no need for it.

When the revision bill came to the House floor in April 1967, it became apparent that section 111 did not offer an acceptable solution. A series of compromises resulted in the entire section being dropped from the bill, which was passed and sent to the Senate without any CATV provision.

In 1968, however, a decision in the Fortnightly case was anticipated by both the parties to the cable-copyright controversy and the Senate, as well. Further, the FCC was pressing forward in its study of the cable problem and regulatory action was deemed at hand.

Senate examination of the cable question culminated in an extensive redrafting of section 111 and produced a provision far exceeding the House version in treating communications policy issues. S. 543 conditioned the right to import signals upon a detailed standard of minimum service, and defined such service in the top 50 television markets as consisting of the three major national networks, three independent commercial stations and one noncommercial educational station. Below the top fifty markets, adequate service was defined as reception of the three major national networks, two independent commercial stations and one noncommercial educational station.

S. 543 provided a compulsory licensing system under which cable systems could import the signal of the nearest station needed to fill the complement of stations constituting adequate service in their area. Complex provisions also treateuithe problem of program exclusivity and set out a graduated royalty rate for the

compulsory license fees.

By 1970, however, it was apparent that this ambitious proposal was in difficulty. The decision in favor of cable companies in the Fortnightly case and the pendency of the Teleprompter action tended to slow the legislative process. Far more important, however, was the opposition of the Federal

Communications Commission to the approach of S. 543.

The Commission, after stressing the necessity of a balanced mixture of communication and copyright policies, had reconsidered its position and launched the rulemaking proceeding that was to culminate in the Fourth Report and Order on Cable Television in 1972. The Commission's regulations fell into four broad areas: 1) signal carriage requirements and a standard of minimum service; 2) program origination requirements, contract carriage

and public access: 3) allocation of Federal, State and local authority over cable; and 4) non-duplication and exclusivity. The Commission thus forced substantial changes in the revision bill to adjust to its new standards, and a so-called "consensus agreement" among some of the parties supposedly cleared the way toward acceptance of limited copyright liability under a compulsory licensing system. The framework of the present version of section 111 emerged from this maelstrom, but was amended further after the Teleprompter decision changed the bargaining positions of the parties and allowed the revision bill to move once more.

Ana isis of section 111;

As presently drafted, Section 111 of H.R. 2223 treats a variety of so-called "secondary transmission." The passive redistribution of local transmissions to the private rooms of hotels and similar establishments, without charge, is exempted under section 111(a) (1). So, too, are secondary transmissions of performance or displays by instructional broadcasters as would be allowed under Section 110(2).

Pure common carriers, who do not exercise direct or indirect control over the selection of programming to be secondarily transmitted, or its recipients, are also exempted. The final exemption in Section 111(a)(4) is in favor of boosters, translators and repeaters, which are non-profit, often governmental broadcast extension devices that customarily do not charge for their service.

Section 111(b) would impose full liability for the secondary transmission of primary transmissions that were not intended for reception by the public at large. Common examples include closed-circuit or pay-TV broadcasts, as well as music

subscription services such as Muzak.

Section 111(c) is the controlling provision governing cable television. Earlier provisions rested on questions of the source of the signal (local or imported) and the market in question (top 50 or second 50 markets), and included an openended provision for payment of a "reasonable license fee." With the FCC regulations establishing a mandatory carriage rule for local signals, and a minimum service standard under which certain distant signals may be imported, all of the "allocations" provisions in Section 111 have been dropped. Instead, Section 111(c) tracks the FCC's actions.

In effect, section 111(c)(1) permits the secondary transmission by cable systems of any primary transmission that it can legally carry under the FCO regulations, but subjects all of these signals to a compulsory licensing system pro-

vided in subsection (d).

To obtain a compulsory license, a cable operator must:

(1) At least one month prior to secondary transmissions, or within one month following the enactment of the bill, record with the Copyright Office a notice containing the identity and address of the owner or operator of the cable system,

as well as the name and location of the signals being carried.

(2) Thereafter, four times yearly, cable systems must submit statements specifying the number of cable channels to be used for secondary transmissions over the next quarter, the name and location of the primary transmitters so carried, the total number of subscribers to the cable service, and the gross receipts of the cable company, from all sources, to date; and

(3) Remit a royalty fee for the period covered by the statement, computed from a sliding scale set out in section 111(d) (2)(B).

Failure to comply with these requirements, both as to the signals that can be carried and the procedural exigencies of the compulsory licensing scheme, will subject a cable operator to full copyright liability.

The remainder of the section deals with distributions of the royalties and settlement of disputes over them. These provisions are closely patterned on those in section 115, dealing with distribution of jukebox royalties.

Title I, Chapter 1, Section 113 and Title II

WORKS OF ART AND OBNAMENTAL DESIGNS

General summary

Section 102 of title I of H.R. 2223 identifies "pictorial, graphic, and sculpturat works" as copyrightable subject matter, and section 106 protects them against reproduction and distribution of copies, adaptation, and public display. The length and scope of their protection is essentially the same as for other copyrighted works.

Title II of H.R. 2223 is, in origin and content, essentially a separate though related piece of legislation. Under the rubric "Protection of Ornamental Designs of Useful Articles" it offers what is in effect a limited form of copyright protection to the ornamental design elements of useful articles.

Section 113 of title I recognizes the obvious overlap between these two forms of protection, and seeks to provide a bridge between title I and title II.

Design patents and copyright protection

Design patents.—The first legislation ever enacted in the United States specifically to protect ornamental designs of useful articles was part of the Pate... Act of 1842. Congress has continued to provide specific design protection under the patent law, and without much change from the 1842 provisions. To secure design patent protection an article of manufacture must meet four requirements: novelty, originality, ornamentality, and invention. The latter requirement means there must be some indefinable quality present which is to be distinguished from what would be obvious to a designer of ordinary skill in the art.

These requirements, especially those of novelty and invention, are most appropriately tailored to inventions in the fields of mechanics, electricity, chemistry, and so on. They are unwieldy when applied to works of creativity—works more closely related to arts than technology. This view is shared by many commentators, and is borne out by the frequent failure of design patents to be upheld in court. Patents for designs have also been difficult, slow, and expensive

to obtain.

Copyright.—As soon as the several problems with the design patent law became apparent to design patent applicants, they began to attempt to register their works under the copyright statute as works of art. The reasons were obvious. The copyright process is simple and the applicant can handle it himself. The cost is minimal, and the time required is normally about three weeks. Moreover, copyright protection begins with publication, and registration can be made later.

The Supreme Court hastened the increase in copyright applications from disillusioned design patent applicants by its decision in *Mazer* v. Stein, 347 U.S. 201 (1954). The court held that use of a work of art (a statuette) as a design of a functional article (a lamp base) was not a bar to copyright protection. An increasing number of copyright registrations have been made for "works of art" which in fact constitute the designs of useful articles, such as textile fabrics, lamps, costume jewelry, toys, dolls, and many others. The courts have consistently upheld the validity of these registrations.

The basic criterion applied by the Copyright Office to determine registrability as a work of art is the existence of artistic features which can be identified separately from any utilitarian article and which are capable of existing independently from the article as works of art. The difficulty of administering this criterion is one reason for the support given by the Copyright Office for special-

ized design legislation.

At present, copyright protection is available only for design which can be considered works of art, a concept that excludes many valuable and esthetically meritorious designs. Many industrial designs of useful articles do not qualify as independently copyrightable works and are therefore denied protection. This is perhaps the major reason a new sui generis type of protection has been sought. The copyright law was not formulated to absorb designs of coffeepots and automobiles, and it is generally agreed that it is inappropriate in other ways. The full copyright term may be too long for many designs, and it may be appropriate to limit the scope of protection for industrial designs in other ways.

Interrelationship of patent, copyright, and sui generis design legislation

The Design Bill, in which has been pending in Congress for a number of years and in the past has been the subject of active consideration in both Houses, was added to the general revision bill as a matter of convenience. It is not intended to replace the possibility of protection for ornamental designs for useful articles under either patent or copyright law. Instead, it will present an additional option which is intended to correct the most serious defects and injustices under the two existing statutes.

The Design Bill affords a maximum of 10 years of protection to original ornamental designs of useful articles which are not novel or inventive under standards, but would not be considered patent works of art under the copyright law Protection is available quickly, upon the marketing of the product, under modified copyright principles. For certain designs which qualify under more than one

system of protection (copyright, Design Bill, or design patent); the designer has an option to choose the form, of protection preferred. Registration under the Design Bill, however, does not affect copyright protection for the design with respect to utilization in a form other than a useful article.

Section 113 of title I: Scope of exclusive rights in works of art under revised copyright law

This provision was inserted to clarify the status of copyrighted pictorial, graphic, and sculptural works that are capable of being used as ornamental designs. Subsection (a) makes clear that, whatever rights works of art enjoy under the present law to prevent their unauthorized use as designs, they will continue to enjoy under the revision bill. However, a published work of applied art may be pictured in advertising or display material or in news reports without copyright liability.

Subsections (b), (c), and (d) of section 113 confirm and define protection for ornamental designs of useful articles under copyright and under design registration as being two separate options for the designer in certain cases. Subsection (b) provides that, when a pictorial, graphic, or sculptural work in which copyright subsists under title I of the bill, is utilized in an original ornamental design of a useful article, the design shall be eligible for protection under the provisions of title II. Subsection (c) provides that protection of a work in which copyright subsists under title I terminates with respect to its utilization in useful articles when the copyright proprietor has obtained registration of the design under title II. However, protection against the use of the copyrighted work in other works of art would endure for the life of the copyright.

SECTIONAL ANALYSIS OF TITLE II

Section 201: Designs protected

The special protection provided by the design bill is available to the author or other proprietor of an "original ornamental design of a useful article." An article which in normal use has an intrinsic ultilitarian function, which function is not simply to portray the appearance of the article or to convey information, is a "useful article." The "design of a useful article," consists of all aspects of the article, including its two or three-dimensional features of shape and surface, which make up the appearance of the article. The design is "ornamental" if it is intended to move the article attractive or distinct in appearance, and it is "original" if it is the independent creation of an author who did not copy it from another source.

Section 202: Designs not subject to protection:

Protection under this section is denied if the design is not original, and this concept is elaborated by statements denying protection if the design is staple or commonplace—such as standard geometric figures (circles or squares for example), familiar symbols, emblems, or motifs, or any other shape, pattern or configuration which has become common, prevalent or ordinary. Designs using these publicly known items cannot escape the prohibition against protection by the addition of insignificant details, minor differences, or variants commonly used in the relevant trade. Nevertheless, one who adds originality to public domain material by a substantial adaptation, revision, or rearrangement is entitled to protection for his contribution.

A design cannot be protected if it is dictated solely by a utilitarian function of the article that embodies it. Finally, and as the result of a major compromise, a design composed of three-dimensional features of shape and surface with respect to men's women's, and children's apparel, cannot be protected.

Section 203: Revision, adaptations, and rearrangements

Employment of subject matter not protectible under section 202 does not bar protection for a design if the new design substantially revises, adapts, or rearranges that unprotectible subject matter. Protection given to a revision, adaptation, or rearrangement of this sort will also be available to designs which employ subject matter already protected under the copyright law (title I of the bill) or the patent law (title 35, U.S. Code), but only if the protected material has been employed with the consent of its proprietor. Protection for a revision using previously registered subject matter is independent of any subsisting protection, and does not grant the author any right to subject matter excluded from protection or extend the term of protection.

Section 204: Commencement of protection

Design protection begins under the bill on the date the design is first made public. The definition of "making public" is quite similar to the criterion for "publication" under copyright law. It occurs when an existing useful article embodying the design is anywhere publicly exhibited, publicly distributed, or offered for sale or sold to the public.

Section 205: Term of protection

Designs will be protected for a term of five years from the date of first being made public, and may be extended for a second term of five years if a proper application for renewal is made during the last year of the original period.

Section 206: The design notice

Whenever any design for which protection is sought under this title is made public, it must be marked with a design notice consisting of three elements: the words "Protected Design," the abbreviation "Prot'd Des.," or the letter "D" within a circle; the year date in which the design was first made public; and the name of the proprietor. The name of the proprietor may be in any one of the several forms.

The notice must merely be applied and located so as to give "reasonable notice of design protection while the useful article embodying the design is passing through its normal channels of commerce." In the case of sheetlike or strip materials bearing repetitive or continuous designs (such as printed fabrics) the notice may be applied to each repetition, to the margin, selvage or reverse side of the material at "reasonably frequent intervals," or to tags or labels affixed to the material at such intervals. If the proprietor has complied with provisions of this section regarding notice, the protection he acquired under this title shall not be affected by the removal, destruction, or obliteration by others of the design notice on an article.

Section 207: Effect of omission of notice

Omission of a design notice is not fatal in infringement suits and does not cause loss of protection, but no recovery is possible if the offender began an undertaking leading to infringement before receiving notice of the design registration.

Section 208: Infringement

Additional safeguards for the innocent infringer, particularly retailer, appear in section 208. A seller of distributor of an article who did not make or impart it is considered an infringer only if he: (1) induced or acted in collusion with a manufacturer to make the infringing article, or an importer to import such an article; or (2) if he refuses, or fails, to make a prompt disclosure of his source of such article, and he orders or reorders such article after having received a personal written notice of the protection subsisting in the design.

Section 209: Application for registration

Application for registration of a design must be made within six months after the design was first published, or protection for the design is lost.

Section 210: Benefit of earlier filing date in foreign country.

This provision is a standard one under international industrial property treaties.

Section 219: Ownership and transfer

The property right vests at the time design registration is made, and may be transferred by any of various means. The bill contains standard recording and constructive notice provisions.

Sections 220, 221, and 222: Remedy for infringement; injunction; recovery

The bill grants a remedy for infringement by civil action after issuance of a certificate. Provision is also made for judicial review of a final refusal to register by the Administrator in section 220. Injunctions may be issued on equitable principles, in accordance with the discretion of the courts.

Section 227: Relation to Copyright Law

The section leaves intact any right or remedy now or hereafter held by any person under the copyright act. It also provides that, when a pictorial, graphic or culptural work in which copyright subsists under title I of the bill is utilized

in an original ornamental design of a useful article, the design shall be eligible for protection under title II.

Section 227: Relation to patent law

The option of registration under this title coexists with the rights and remedies under title 35, the patent law. However, issuance of a design patent for an ornamental design under title 35 terminates any protection of the design under this title.

Section 229: Common law and other rights unaffected

Any common law rights or remedies available to a proprietor of a work not made public are left intact by passage of the design bill, including trademarks and the right to protection against unfair competition.

Section 230: Administrator

The Office and Administrator of the Design Protection Act will be designated by the President of the United States.

CHAPTER 1, SECTION 114 AND H.R. 5345

RIGHTS IN SOUND RECORDINGS

Summary

Neither the present copyright law nor the revision bill extends protection to performances of sound recordings. A proposal to establish a compulsory licensing system governing the public performance of sound recordings was included in revision bills pending in the Senate between 1969 and 1974. In passing the revision bill last September, the Senate adopted the Ervin amendment striking the provisions relating to public performance of sound recordings. As under the present law, the revision bill in section 114, would grant only the limited right to reproduce and distribute exact duplications of sound recordings. It would not confer any rights to prepare derivative works or to perform the sound recordings.

The proposal to create a right in the performance of sound recordings is pending before to 1.12 Congress in H.R. 5345, a separate bill introduced by Mr. Danielson to revise to provide a fall in the revision bills. A compulsory licensing system very created, apparently to provide a fall-back solution in case voluntary negotiation fails. The bill in its present form requires some technical indiustments in two areas: amantitrust exemption is necessary to facilitate voluntary negotiations and an organization should be designated to receive royalties paid under compulsory licenses. Should the Danielson bill be rejoined with section 114 of the revision bill, it would presumably resume the form of the earlier Senate versions of that section, in which these technical problems are dealt with to some extent.

Background.

Sound recordings embody the efforts of three groups who consider themselves entitled to federal statutory copyright protection. The first group consists of the authors or composers who are the initial owners of works embodied in sound recordings. The second group consists of the record producers who employ the sound engineers, directors, and others responsible for capturing and editing the sounds reproduced on recordings. The third group is made up of the musicians, singers, actors and others whose performances are captured on sound recordings.

Authors and composers receive the greatest protection under the present copyright statute. Copyright protects their right to contract initially for or license the reproduction of their copyrighted work in the form of phonorecords. Although the copyright statute then allows anyone to make a phonorecord of the work, a subsequent manufacturer must comply with the compulsory licensing provisions of the law which require a two cent payment to the copyright owner for each phonorecord manufactured. In addition, the present statute affords to the author or composer the exclusive right to perform the work publicly for profit. This means that a phonorecord of a copyrighted composition may neither be broadcast over commercial radio or television nor played for profit by suppliers of background music without the permission of the composition's owner. As a practical matter, the right to broad, et copyrighted works embodied in phonorecords is obtained through blanket licenses from organizations such as ASCAP, BMI, and SFSAC, who protect the financial interests of their author and composer members.

The present copyright statute as amended in 1971, also affords limited protection to sound recordings. The owner of copyright in a sound recording, which may be the performers, the record producer, or both, enjoys the exclusive right "(t) o reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of" that particular sound recording. This right does not protect the copyright owner from other renditions of the underlying work, even if the other renditions "imitate or simulate those in the copyrighted sound recording." Further, the right does not "extend to . . . reproductions made by transmitting organizations exclusively for their own use." The provisions governing sound recordings were added to the law because the massive dissemination of piratical records and tapes was depriving performers and record producers of substantial income.

Under present Federal law, performing artists and record producers are afforded no copyright protection against the unauthorized performance of their sound recordings. Over the years, their efforts to change this situation have caused considerable controversy. Recent attempts to expand the copyright revision bill to include recognition of a performance right in sound recordings began in earnest with an amendment proposed by Senator Harrison Williams in the 91st Congress (1969). A modified version of Senator Williams' amendment was a part of the revision bill approved by the Senate Committee on the Judiciary

last year, section 114 of S. 1361.

After leaving the Judiciary Committee, the revision bill was referred to the Senate Committee on Commerce. The report of the Commerce Committee recommended amending the bill to exempt from infringement liability the public performance by a radio or television broadcasting station of a copyrighted recording. In the course of floor consideration of the revision bill last September, the Senate adopted an amendment sponsored by Senator Ervin, striking the record performance right entirely.

ARGUMENTS FOR AND AGAINST PERFORMANCE RIGHT IN SOUND RECORDINGS

Arguments făvoring a performance right -

Performing artists and record producers argue that they should be assured compensation when their performances as embodied in sound recordings are utilized for profit, since their efforts are clearly original, intellectual creations entitled to protection as "writings" under the United States Constitution. They point out that a great many countries throughout the world recognize that sound recordings cannot be performed publicly without reasonable compensation.

They note that most radio stations devote a large amount air time to the performance of sound recordings and, as a result, derive substantial income from their advertisers. Only the owner of copyright in the musical composition receives compensation for these public performances, although the performing artist, and sometimes the creative elements in the recording as such, are often the greatest factors in a sound recording's success. The same type of argument is made with respect to jukebox operators and suppliers of background music; they enjoy a profit from the public performance of sound recordings, while the performers and

record producers receive nothing.

Proponents of a performance right in sound recordings also point out that the present revision bill not only denies Fe val copyright protection, but also strips them of any existing common law, or potential State statutory rights since State law is pre-empted by section 301. Prior to the recent Supreme Court decision in Goldstein v. State of Collifornia, 412 U.S. 546 (1973), it could be persuasively argued that the common law or ta utes of a State could offer protection in the nature of a copyright to a recorded performance only until the sound recording embodying the performance was id, or publicly distributed. The Goldstein opinion, however, supports the view that a State has a broader power to recognize a property right in the nature of a copyright in a performance embodied in a sound recording. The decision suggests that such a right could be unlimited in duration. Although there are presently no state statutes recognizing such a performance right in sound recordings, Goldstein indicates that such a statute might be valid unless Congress has evidenced a contrary intention.

Arguments oppositre a performance right

Opposition to -y recognition of a performance right in sound recordings comes primarily from broadcasters, CATV and jukebox operators, and suppliers of background music. Some argue that the contributions of performers and rec-

ord producers to sound recordings, although significant, lack sufficient intellectual creativity to justify protection as "writings of an author" under the copyright clause of the Constitution. They argue that the problems surrounding sound recording performances as so complex, and involve so many conflicting economic interests, that adequate study would seriously delay passage of a much needed copyright revision bill. They suggest that neither performers nor record producers have demonstrated any pressing economic need; record companies appear to be thriving financially, and performers seem to be sufficiently compensated through contract.

Commercial broadcasters and other users point out that their public performance, of sound recordings already benefits both record producers and performing artists. The producers benefit because air play stimulates records sales. The increase in record sales also benefits the performers because most have royalty agreements with the record producers, and because they obtain free publicity

through the public airing of their performances.

They also point out that they already pay a substantial amount to groups representing authors and composers for the right to perform copyrighted works publicly. They argue that requiring them to pay the performers and record companies as well would be an unjustifiable economic hardship. The additional burden could force many marginal operations out of business. This result, they submit, not only would be neft no one, but would actually be detrimental to the interests of performers and record companies.

Analysis, of the record performance royalty in section 114 of 1974 bill

The revision bill reported favorably by the Senate Judiciary Committee included a right in the public performance of sound recordings. Radio and television stations, cable television, jukebox operators, and background music services were subject to its provisions. The bill provided that, once phonorecords of a sound recording had been distributed to the public under the authority of the copyright owner, the public performance of the sound recording would be subject to compulsory licensing. Although a negotiated license could be substituted for the compulsory license, the bill provided that the negotiated rate of royalty fees could not be less than the compulsory rate. The bill outlined the procedures to be followed in obtaining a compulsory license and also provided for a deposit of the required royalty fees with the Register of Copyrights. In the absence of a negotiated license, failure to comply with the specified requirements would render the public performance of a sound recording an act of infringement, subject to the civil remedies set forth in the bill.

The royalty fees required by the bill could be computed on either a blanket or a prorated basis. The compulsory incensing rate for radio and television stations would have been based upon the radividual station's gross receipts from advertising sponsors. Stations with gross receipts under \$25,000 per year were specifically exempted from any liability, while those with receipts over \$200,000 were required to pay one percent of their net sponsor receipts for a blanket license. For broadcast stations with gross receipts greater than \$25,000 but less than \$100,000, the bill provided that the yearly payment would be \$250. In the case of stations having gross receipts greater than \$100,000 but less than \$200,000, the payment

would have been \$750.,

For background music services and other transmitters, the bill provided a blanket rate of two percent of gross receipts from subscribers or others who pay to receive the transmission. If such receipts were less than \$10,000, the bill specifically exempted the transmitter from any liability. For all other users not otherwise exempted or covered, the blanket rate was \$25 per year for each location where the sound recordings were to be performed. For users who wished to pay on a prorated basis, the bill empowered the Register of Copyrights to prescribe, for each class of users, a standard formula for computing the royalty fee. Section 116 of the bill provided that one eighth of the funds distributed to beneficiaries of the compulsory license fee for jukeboxes would be allocated to copyright owners and performers of sound recordings, in the case of sound recordings performed by means of secondary transmissions on cable systems, the record producers and performers were entitled to share in funds distributed to beneficiaries of the compulsory license fee for secondary transmissions under section 111.

The bill directed the Register of Copyrights, after deducting reasonable administrative costs, to distribute the funds deposited to those entitled, or to their designated agents. In the event of a controversy concerning the distribution of funds, the bill provided that the Copyright Royalty Tribunal should resolve it.

Analysis of Danielson bills (H.R. 5345)

H.R. 5345 would establish a performance right in sound recordings within the context of the present 1909 Act. While portions of the bill are similar to the record performance right provisions in section 114 of S. 1361, several significant changes had to be made in order to draft the provision within the constraints of the present law. Certain other amendments are probably necessary to make the provisions workable apart from the revision bill.

The framework of the Danielson bill tracks the former proposal in S. 1361. Once the sound recording has been distributed in copies to the public, a compulsory license mechanism is triggered. Negotiated licenses may be substituted for compulsory licenses, but the royalty cannot be less than the annual rates set in the bill. The statutory rates are similar to those in S. 1361. A principal difference is that one rate is set for television stations and another for radio stations.

Jukebox operators would pay \$1 annually for each player.

The bill does not establish a statutory body to fulfill the role of the Copyright Royalty Tribu al in distributing royalties, nor is the Register of Copyrights or any other organization designated to receive royalties. As a technical matter, the general authority given to a panel of the American Arbitration Association may not be adequate to handle the collection and distribution of fees. Another significant departure from the proposal in S. 1361 is the absence of an exemption from the antitrust laws to facilitate negotiation of voluntary licenses.

CHAPTER 1, SECTION 116

PERFORMANCES OF MUSIC ON COIN-OPERATED PHONORECORD PLAYERS ("JUKEBOAES")

Background and summary

The last paragraph of section 1(e) of the present copyright law exempts jukebox operators from the obligation to pay royalties for the public performance of copyrighted music. This provision was added to the 1909 Act as part of a last minute compromise dealing with coin-operated player planos, and it has generally been regarded as an unjust anachronism, especially since the emergence of jukeboxes as a major entertainment industry.

Persistent efforts to repeal the jukebox exemption have gone forward for half a century without success, despite the widely held view that the present blanket exemption unfairly deprives copyright owners of significant revenue and discriminates against all other commercial users who must pay copyright royalties in order to perform copyrighted music. No other copyright law in the world has a provision exempting performances of music on coin-operated record players from liability. Since U.S. composers are paid when their songs are performed abroad on jukeboxes, our international relations are strained by the failure of our law to protect foreign composers on a reciprocal basis.

The jukebox industry has argued for exemption or special treatment on several grounds: that the payment of royalties by recording companies to music proprietors for reproduction of the music on phonorecords is passed on to jukebox operators; that the bargaining position of the parties is unequal; that the repeated performance of songs on jukeboxes increases their popularity and adds to their profits from other types of uses; and that the economic impact of an

added "tax" on jukebox operators would be adverse.

The issue of jukebox liability was sharply drawn in the context of the 1965 revision bill, and a compulsory licensing provision, the basis for section 116 of H.R. 2223, emerged as a compromise. The dispute over the statutory amount to be fixed as the compulsory licensing fee continued until the eve of passage by the House of Representatives of the revision bill in 1967, which set the

annual fee at \$8 per box.

During Senate consideration of copyright revision between 1967 and 1974, the concept of a Copyright Royalty Tribunal was added to the bill. The provisions dealing with the Tribunal appear in Chapter 8 of the revision bill, and are discussed in a separate Briefing. Originally, the Tribunal was charged with reviewing all statutory royalty rates established in the bill, including the rate for jukebox performances. Senate Judiciary Committee Report No. 983 (93rd Congress, 1st Session) expressed the view that the statutory royalty rates should be subject to periodic review as a matter of sound public policy. However, when the Senate in September 1974 assed the revision bill, it added an amendment sponsored by Senator Hollings trat removed the jukebox royalty from review by the Tribunal. At the present time the question of whether the \$8 annual fee

should or should not be subject to periodic review by the Tribunal appears to be the principal, if not the only, remaining issue affecting jukeboxes.

ANALYSIS OF SECTION 116

Subsection (a): Scope of compulsory license

Section 116 of the revision bill repeals the blanket exemption for performances of music on jukeboxes, and substitutes a compulsory licensing system. This system applies to "a nondramatic musical work embodied in a phonorecord" and gives the operator of a particular "coin-operated phonorecord player" a compulsory license "to perform the work publicly on that phonorecord player" if he follows a prescribed procedure and pays the established \$8 fee. The proprietor of the establishment where the performance occurs would be exempt from liability for infringement unless he is also the operator of the machine, or unless he fails or refuses to reveal the identity of the operator.

Subsection (b): Compulsory licensing procedure

The compulsory license to operate a coin-operated phonorecord player is acquired by filing an application with the Copyright Office within one month after the machine is placed in use. Renewal of the license is required every January for each box. The application for each jukebox certificate must be accompanied by a yearly royalty fee of \$8, with provision for prorating for half a year or less. Once the certificate is issued by the Copyright Office. It must be affixed to the machine in a way that would be readily visible to the public. Failure to follow each step of this procedure (filing the application, paying the royalty and affixing the certificate) would make any public performance on that machine an infringement subject to all remedies for infringement this bill would provide.

Subsection (c): Distribution of royalties

The royalty fees collected from the operators would be distributed by the Register to those copyright owners entitled. A musical copyright owner of a nondramatic musical work who is not affiliated with a performing rights society would receive the pro rata share of the fees to be distributed to which he can prove he is entitled. The performing right societies would distribute the remainder of the fees according to such agreements as they may stipulate among themselves, and section 116 insulates them from the anti-trust laws for this purpose. The Register of Copyrights is to constitute a panel of the Copyright Royalty Tribunal, in accordance with Chapter 8, if a controversy arises concerning the distribution of particular royalty fees.

Subsection (d): Criminal penalties

Section 116 provides special fines for false statements in an application, for altering a certificate, or for affixing a certificate to the wrong box.

Subsection (e): Definitions

Definitions of "coin-operated phonorecord player," "operator," and "performing rights society" are provided for the special purposes of section 116.

CHAPTER 1, SECTION 115

COMPULSORY LICENSE FOR REPRODUCTION OF MUSIC ON PHONORECORDS

Background and summary

Section 1(e) of the Act of 1909 established the first, and so far the only, compulsory license in our copyright law. For the most part unchanged since 1909, the so-called "compulsory licensing" or "mechanical royalty" provision permits the reproduction of copyrighted music on records once the copyright owner has recorded his work or licensed someone to do so.

Some consideration was given, at the outset of the current effort to revise the copyright law, to outright abolition of this compulsory license provision, but the arguments in favor of retention proved persuasive. A number of criticisms of specific aspects of the present system were considered, notably the amount of the statutory royalty, which has remained at two cents per song per record manufactured, since 1909. A related question was the criterion for determining the number of records for which a royalty must be paid. Recent litigation has also, thrown a spotlight on an additional issue: whether unauthorized duplicators

57-786-76-pt. 3-44

of musical sound recordings are eligible to obtain a compulsory license to re-

produce the copyrighted music on their tapes or disks.

Section 115 of the revision bill now provides for a rate of 3 cents per work embodied in each phonorecord, or 34 of one cent per minute of playing time or fraction thereof, whichever is larger. The new rate is payable for every phonorecord "manufactured and distributed in accordance with the license," and unauthorized duplicators of sound recordings are not eligible for the compulsory license. The bill explicitly limits the applicability of this compulsory license provision to nondramatic musical works reproduced in phonorecords, and clears up several other ambiguities in the present law.

General considerations

An earlier debate centered about the case for any increase in the 2 cent royalty rate of the present law. The conclusion reached by the 1967 House Judiciary Subcommittee, after weighing the economic arguments and counter-arguments, was that some increase was justified, and the subcommittee settled on 21/2 cents. The current debate centers on the request of the authors and publishers of music for a still higher royalty rate in view of the marked inflationary spiral between 1967 and the present.

In assessing the case for a higher statutory rate, it seems useful to review briefly the general arguments and counterarguments on the issue of an increase in the statutory rate. The following are the major arguments of the authors

and music publishers:

(i) The marked increase in level of prices since 1909 and again since 1967

should result in a higher statutory rate.

(ii) The relative bargaining positions of music proprietors and record companies have shifted radically since 1909 and record companies have a strong if not predominant position in the music field.

(iii) Statistics purporting to show only modest recording company profits are misleading because of cross-ownership involving broadcasters, motion picture

companies, recording artists, and recording companies.

(iv) The rigidity of a statutory rate, even though subject to periodic review by the Copyright Royalty Tribunal, creates an unfavorable bargaining position in negotiating voluntary licenses. The statutory rate operates as a ceiling and depresses the rates actually agreed to in bargaining, and therefore the rate should be higher to allow more flexibility in private negotiations.

The arguments of the record producers in support of a lower fee can be

summarized as follows:

(i) Inflationary trends since 1909 are meaningless in view of other economic changes in the industry that have kept the price of records down; recent increases were overdue and entirely justified. Since long-playing records and tapes rather than single records now dominate the market, the royalty is usually 20 cents or more per unit rather than 2 cents.

(ii) Music proprieto. receive income from many sources for use of their music, but record companies must rely on income from one source, the sale of records.

(iii) An increase in the statutory royalty rate beyond that proposed in the Bill would have grave impact on the entire record industry; either the increase would have to be passed on to consumers or some companies would be forced out of business or forced to cut back drastically on the number and quality of their offerings.

ANALYSIS OF SECTION 115

General comment

This section retains the essential features of the present law's compulsory licensing system, but introduces a number of modifications that either clear up uncertainties under the existing law or dispense with unnecessary procedures. Unlike the new compulsory licensing systems for jukeboxes (section 116) and cable television (section 111), the system established by section 115 does not involve the Copyright Office in the collection of, accounting for and disbursement of fees. As under the 1909 Act, these matters are handled between the parties. On the other hand, the amount of the royalty (now pegged at 3 cents per work per record in H.R. 2223) is made subject to review by the Copyright Royalty under Chapter 8.

Subsection (a): Availability and scope of compulsory license

The license may be obtained only for the making and distribution of phonorecords containing nondramatic music, and only after the copyright owner has himself authorized distribution of the records of his work. Dramatic works, including operas and musical comedies, are not subject to this compulsory license. Unauthorized duplicators are not given the privilege of obtaining a compulsory license. The license is available only to those who manufacture records primarily for distribution and sale to the general public for private use, and not to others, such broadcasters, jukebox operators, and background music services, whose purpose is making recordings is primarily for public performance.

Subsection (b): Procedure for obtaining compulsory license

The bill no longer requires the copyright owner to file a "notice of use" in order to collect royalties, but it retains, in modified form, the requirement that the user under a compulsory license provide advance notice to the copyright owner of his intention.

Subsection (c): Payment of royalty

The royalty must be paid monthly to the copyright owner or his agent, as under the present law, with appropriately certified statements of account. A procedure for terminating a license for non-payment of royalties is also provided.

COMPUTER USES OF COPYRIGHTED WORKS

Summary

The use of copyrighted materials in information storage and retrieval systems is a comparatively recent issue in copyright law and was not covered by the first bill in the current revision effort. (S. 1006 and H.R. 4347, 89th Congress, 1st Session, 1965). In the course of the 1965 House Hearings on the pending revision bill, the problem "was touched on rather lightly." It came to the forefront during Senate Hearings in 1967 on the revision bill. The computer software industry, educational groups, and others opposed the view expressed in House Committee Report No. 83 (90th Congress, 1st Session, 1967) that the exclusive rights provision of the bill (section 106) would protect proprietors against "reproduction of a work (or a substantial part of it) in any tangible form (paper, punch cards, magnetic tapes, etc.) for input into an information storage and retrieval system; . . . preparation for input of an index or abstract of the work so complete and detailed that it would be considered a 'derivative work' . . ."
[H. Rept; No 83 at 54]

A national commission was proposed to study this problem in depth and has now been created by Public Law 93-573. As a necessary feature of the commission proposal, an agreement was reached that the revision bill would not change the existing copyright law regarding computer uses of copyrighted works, pending the report of the commission. Hence, section 117 is intended to maintain the status quo: whatever protection or freedom from liability exists now would not be tampered with by this bill:

BACKGROUND OF THE ISSUE

General statement

The focal issue in the debate over copyright liability for computer uses of copyrighted works has been whether "input" of copyrighted materials into an information storage and retrieval system should be an infringement of copyright, at least under certa'r circumstances. There is general agreement that use of copyrighted works that is reflected in hard-copy output can be determined by general principles of liability. "Input" presents unique and difficult problems.

Arguments against considering "Input" an infringement

Those who consider that "input" should not be an infringement argue that liability would greatly handicap development of information storage and retrieval systems as tools in scholarly and commercial research, and that the present law on the point is at best ambiguous. They also maintain that the sole act if input is not commercially important. In their view, requiring payment at this point is comparable to requiring a restaurant customer to pay before seeing the menu. The copyrighted material that constitutes the "input" might never be used in any way that could harm the copyright owner economically, or the material might only be used in ways which are legally permissible under the judicial doctrine of fair use. Since the real danger, it is argued, is the later dissemination of the copyrighted material in derogation of the owner's rights, the proper time for paym' it is when, and if, such dissemination occurs at time of "output," not "inp

In any case, opponents of copyright liability feel that authors and publishers are anticipating a problem prematurely. The opponents suggest a great deal of technical development must occur before large amounts of material can be fed into a computer. They argue that the rapid expansion of information has become virtually unmanageable and future technology, through data processing equipment, can offer ways to improve the research process, reduce duplication of effort, and undertake research which could not have been attempted without this technology. If the revision bill restricted activities now believed to be legal, they believe it could stop the advancement of technology in this direction.

Arguments favoring "input" as infringement

Authors and publishers, who contend that "input" is now, and should continue to be, a violation of their rights, offer several arguments to support their position. They point out the difficulty of accounting control over "output" of copies, both tangible and intangible, once the copyrighted material is placed in a data bank. A copyrighted work stored in a data bank may become available, via computer, to many different users—perhaps hundreds of thousands as computer technology develops and interconnections proliferate. Those who support "input" restrictions feel "the copyright owner should have the right to license others to reproduce his work in the necessary form for computer storage, and to charge for additional copies of that work when read out by the computer." Allowing unrestricted "input" of copyrighted materials, they believe, would greatly increase the possibility of subsequent leakage of the copyright owner's work in the form of both tangible copies and intangible, transitory images. This could well result in reducing the incentive of authors to create and publishers to publish.

reducing the incentive of authors to create and publishers to publish.

Authors and publishers believe that "input" restrictions would not retard the development of information storage and retrieval systems. They point out that there is a vast amount of available material in the public domain and that many publishers would willingly issue licenses for experimental use of copyrighted material. Not only does the likelihood exist that the mere presence of an electronic reproduction in a machine could deprive a publisher of a substantial market for printed copies, but there would also be no market for the copyrighted work in machine-readable form.

Supporters of "input" as infringement point out that it would be inequitable, even if it were feasible, to limit copyright control to the "output" of the particular computer system. Such a limited approach to accountability would not adequately reflect the value of the function which the copyrighted work performs. Manipulation of the material within the system by computation, analysis, comparison, or combination with other data might well be of great value to the computer user, yet there would be no adequate compensation for the creative efforts of the author. In addition, it would be extremely difficult for a copyright owner to protect his work against distortion, mutilation, or other misuses if he has no control over input.

National commission on new technological uses of copyrighted works

Throughout the entire period of controversy regarding the input and storage of copyrighted material in information systems, there has been one point upon which both sides are in substantial agreement: "sufficient information is currently not available to provide the foundation for a sound judgement concerning the future development of the technology and the necessity for modification of the copyright statute." Senate Report No. 983, 93rd Cong., 2d Sess., 1974 at 209. This conclusion is amply supported by testimony given at the 1967 Senate hearings. The arguments presented by both sides during the hearings were largely based on hypothetical problems—not present issues, but anticipated ones. Both those who opposed input restrictions and those who supported such restrictions indicated there was a pressing need to study the entire area and to compile data upon which to base lasting copyright legislation.

In addition to the danger of legislating prematurel, in the computer field, the Senate Judiciary Committee noted that a search for a final solution to this problem could delay passage of a general copyright revision bill for several years. The Committee expressed the belief that "(s) uch a delay would be extremely undesirable in view of the obvious need for revision of the copyright statute, which is essentially that enacted in 1909," Senate Report No. 983 at 200. A procedure was needed which would allow for a thorough study of the problem presented by the use of copyrighted materials in conjunction with information storage and retrieval systems, but which would not delay passage of a much needed general revision bill.

Congress provided for the creation of a body to study and make recommendations concerning computer uses of copyrighted works by enacting Public Law 93-573. This created in the Library of Congress a National Commission on New Technoligical Uses of Copyrighted Works. Among other functions, the Commission is "to study and compile data on the reproduction and use of copyrighted works of authorship in conjunction with automatic systems capable of storing, processing, retrieving and transferring information. . . "It is also provided that "(t)he Commission shall make recommendations as to such changes in copyright law or procedures that may be necessary to assure access to copyrighted works, and to provide recognition of the rights of copyright owners." The law provides that the Commission "shall submit to the President and the Congress a preliminary report on its activities" within one year of its first meeting. Within three years of the enactment of Public Law 93-573, the Commission is required to submit "a final report on its study and investigation which shall include its recommendations and such proposals for legislation and administrative action as may be necessary to carry out its recommendations."

Analysis

Section 117 of the revision bill, in the words of Senate Judiciary Committee Report No. 983, "is intended neither to cut off any rights that may now exist, nor to create new rights that might be denied under the Act of 1909 or under common law principles currently applicable." [Page 154] However, as is further indicated in the Senate Report, section 117 is intended to preserve the status quo only with regard to those exclusive rights of a copyright owner enumerated in section 106 and qualified in sections 107 through 116.

Any action for infringement of a copyrighted work through its use in conjunction with a computer or similar information system would be a Federal action brought under the new title 17. If the question before the court required a decision on the scope of exclusive rights in the computer area, the court "would first need to determine the applicable law, whether State common law or the Act of 1909." Once the court has determined what law is applicable, "its decision would depend upon its interpretation of what that law was on the point on the day before the effective date of the new statute." [Senate Report No. 983 at 155.] This procedure is generally acceptable to both sides of the "input' as infringement" controversy because both believe that, under present law, their viewpoint would prevail.

CHAPTER 2

OWNERSHIP, TRANSFER, DIVISIBILITY, REVERSION-

Summary

Chapter 2 of H.R. 2223 deals with ownership and transfer of rights. Some of the issues underlying this chapter were controversial at one time, but after compromises and redrafting there has been no debate over this chapter for several years.

The chapter begins with a reconfirmation that the fountainhead of copyright is the author, and that copyright ownership belongs to him in the first instance. As under the present law, an exception is made in the case of works made for hire. Provisions have been added clarifying the present law with respect to ownership of contributions to collective works and the divisibility of rights under a copyright.

A system of reversions, under which a disadvantageous transfer of rights can be terminated after 35 years by the author or certain of his beneficiaries is substituted for the renewal system of the present law.

SECTION 201: OWNERSHIP

Collective works

Section 201(c) seeks to clarify one of the most difficult questions under the existing law: the ownership of contributions to periodicals and other collective works. It states explicitly that copyright in a contribution is separate from copyright in the collective work as a whole and that, in the absence of an express transfer, the owner of the collective work obtains only certain limited rights with respect to each contribution.

Divisibility

Subsection (d) of section 201 is even more far-reaching in its effects. In theory, under the present law, a copyright has been considered a single, indivisible bundle of exclusive rights. In practice this theory has been recognized

as unworkable, and copyright proprietors, with the sanction of the courts in most cases, have developed customs and usages on the basis that copyright is divisible. Various subsidiary rights have been created and are marketed separately—for example, magazine serial rights; book club rights; motion picture rights; and synchronization rights. The copyright has also been licensed for a period of time or for a particular territory. Tension between theory and practice under the existing law has produced some strange and, more importantly, some unjust results in those cases where the courts have not been able to accommodate copyright theory to commercial reality. The revision bill would recognize in the clearest possible terms the divisibility of copyright, and allow copyright owners to transfer any part of their rights established by section 106 of the Bill. Any part not transferred would remain their property. This principle of divisibility of copyright is contained in clause (2) of section 201(d) which permits transfer of any of the exclusive rights or any subdivision of any right. This principle is reinforced by a definition in section 101, providing that a transfer of copyright ownership includes "an assignment, mortgage, exclusive license, or any conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright . . ." The divisibility concept applies whether the transfer is limited in time or place.

Involuntary transfers

The revision bill emphasizes the fundamental principle that copyright derives from authorship and therefore all rights vest initially in the author or authors. Special provisions are made for works made for hire and collective works. Although the bill also recognizes the possibility of transfers by operation of law, such as mortgage foreclosures and bankruptcy proceedings, these are consistent with the author's freedom to transfer his rights since he has voluntarily acted

in some way to subject himself to these traditional legal proceedings.

A different case is presented by the possibility of involuntary transfer of an author's rights by a governmental act of expropriation. In response to this issue, the revision bill contains a provision in section 104(c) denying effect under United States law to any act of expropriation by a foreign government or governmental organization. The principle that this subsection is intended to reflect very likely exists already in our law, but it has not been specifically tested in the courts. Another approach to this question would extend the applicability of the principle against expropriation to any government, including the United States or any subdivision of it. Therefore, it may be more appropriate to state the principle in general terms in a new subsection following subsection (d), which establishes the divisibility principle.

SECTIO: 202: DISTINCTION BETWEEN COPYRIGE IS AND MATERIAL OBJECTS

The language of section 202 makes clear that, unless an author has expressly transferred his rights in a particular work, his sale of a material object (for example, a manuscript or a painting), does not carry with it his copyright in the work.

SECTION 202: DISTINCTION BETWEEN COPYRIGHTS AND MATERIAL OBJECTS

Summary

Under Section 24 of the present law, copyright as a general rule reverts at the end of the first term of 28 years to the author if living or, if the author is not living to other specified beneficiaries, if an application for renewal is made within the 28th year of the original term. This reversion-renewal provision was intended to give authors a "second chance" to reap the benefits of their creative efforts. In practice, the second chance often does not materialize because the author has assigned the contingent rights in the renewal term well before his right vests, and his assignee reaps the benefits of the renewal term if the author survives until the renewal vests. Failure to comply with the registration formality also leads to unintended forfeiture of copyright in many cases.

The revision bill drops the renewal device, but permits the author or his widow, children or grandchildren to terminate any grant he himself has made of his rights after 35 years (or up to 40 years in certain situations). In order to effect termination, an advance written notice, signed by a proportional majority of those owning a termination interest would have to be served on the grantee within specified time limits. Grantees would be given the equivalent of a right of "first refusal," and grantees who have made derivative works during the 35-year period could continue to use them in any event.

Background

In the initial stages of drafting the revision bill one of the most difficult issues was the problem of how to protect authors against unremunerative transfers, while getting rid of the complexity, awkwardness, and unfairness of the present

renewal provision.

To individual authors the principle of reversion is extremely important, since they are frequently in an unequal bargaining position and the value of a work before exploitation is uncertain. This position was challenged by representatives of publishers and motion picture producers, among others, who argued that authors generally are not in an economically disadvantageous position, especially since they assume none of the risk of loss involved in the exploitation of their

Analysis of Section 203.—Despite these conflicting views, an acceptable if rather complicated compromise was adopted. Instead of being automatic, as is theoretically the case after 28 years under the present renewal provision, a transfer or license under section 203 could be terminated only by means of an advance notice within specified time limits and under specified conditions. However, although affirmative action is needed to effect a termination, the right to take this action cannot be waived in advance or contracted away. Under section 203(a) the xight of termination would apply only to transfers and licenses executed after the effective date of the new statute, and would have no retroactive effect.

The right of termination would be confined to inter vivos transfers or licenses executed by the author, and would not apply to transfers by his successors in interest, or to his own bequests. The scope of the right would extend not only to any "transfer of copyright ownership," as defined in section 101, but also to nonexclusive licenses. The right of termination would not apply to "works made for hire," which would exempt works prepared by an employee within the scope of his employment and certain works prepared on special order or commission.

CHAPTER 3, SECTION 301

FEDERAL PRE-EMPTION

Summary

Instead of the present dual system of protection of works under state common law before they are published and under Federal statute after publication, the bill would, under section 301, establish a single system of statutory protection for all works whether published or unpublished. The common law would continue to protect works (such as live (loreography and improvisations) up to the time they are fixed in tangible form, but upon fixation they would be subject to exclusive Federal protection under the statute, even though they are never published or registered.

Background

Any effort to revise the copyright law of the United States must include consideration of the merits and drawbacks of our present system of dual copyright: "common law copyright" for unpublished works under State law, and statutory copyright for published works under Federal law. This dual system of copyright has been in effect since the first U.S. Copyright Act of 1790, and turns on the rather outdated concept of "publication."

In the 1961 Report of the Register on the General Revision of the U.S. Copy-

right Law it was suggested that the concept of "publication" should be clarified and broadened into a concept of "public dissemination," but that the general framework of the dual system should remain intact. This suggestion met with strong opposition, primarily on the grounds that "public dissemination" of a work was not a reasonable or practical basis on which to establish Federal copyright protection. Although there was some support for retaining common law copyright, the overwhelming sentiment was in favor of a single Federal copyright system with protection starting upon creation and with a limited term for all works, published or unpublished, disseminated or undisseminated.

Section 301 therefore establishes a single Federal copyright system with respect to all works created after its effective date, whether or not they are ever published or disseminated. With respect to works created before the effective date of the statute and still under common law protection, section 303 of the statute provides protection from that date on, and guarantees a minimum period of statutory copyright.

Advantages of a single Federal system

Essentially, four significant arguments have been advanced in favor of the

single Federal system. These arguments can be summarized as follows:

(1) Promote national uniformity.—One of the fundamental purposes behind the copyright clause of the Constitution was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional

(2) Reduce Legal Significance of "Publication."—Perhaps the most serious defect in the present law is its undue reliance on the outdated concept of "publication." Although at one time, when works were disseminated almost exclusively through printed copies, "publication" could serve as a practical dividing line between common law and statutory protection, this is no longer true. With the development of the 20th-century communications revolution, the concept of publication has become increasingly artificial and obscure. To cope with the legal consequences of an established concept that has lost much of its meaning and justification, the courts have given "publication" a number of diverse interpretations, some of which are radically different. Not unexpectedly, the results in individual cases have become unpredictable and often unfair. A single Federal system would clear up this chaotic situation.

(3) Advance "Limited Times" Provision of Constitution.—Enactment of section 301 would implement the "limited times" provision of the Constitution, which has become distorted under the traditional concept of "publication." Common law protection in "unpublished" works is now perpetual, no matter how widely they may be disseminated by means other than "publication." The revision bill would place a time limit on the duration of exclusive rights which could be asserted on such works. The provision would also aid scholarship by making unpublished manuscripts available for publication after a reasonable period.

(4) Promote International Exchange of Intellectual Property.—Adoption of a uniform national copyright system would greatly improve international dealings in copyrighted material. No other country has anything like our present dual system. In an era when copyrighted works can be disseminated instanteously to every country on the globe, the need for effective international copyright relations, and the concomitant need for national uniformity, assume ever greater importance.

Recent developments concerning the dual system of copyright

Section 301 has been one of the bedrock provisions of the current program for general revision of the copyright law since the introduction of the first revision bill in 1964. General support for a single Federal system of copyright has been widespread and, until recently, the wording as well as the underlying intent behind section 301 appeared to be consistent with the judicial trend of limiting the rights of States to enforce rights similar to patent and copyright protection.

Recently, there have been some new developments concerning the judicial stance on the dual conyright system, and Congress may be asked to consider changing some of the wording in section 301. These developments were the immediate result of the phenomenon of tape piracy, the lack of Federal protection for sound recordings fixed before February 15, 1972, and the activities of many of the States aimed at deterring tape piracy within their jurisdictions. The problem of tape piracy was not addressed at the Federal level until 1971, when Congress enacted P.L. 92-140 providing both civil and criminal remedies against piracy of published sound recordings fixed after February 15, 1972. In the meantime, many States had enacted statutes of their own against the practice, and the constitutionality of a California criminal law on the subject was raised in Goldstein v. California 412 U.S. 546 (1973). In a 5-4 decision, the Supreme Court upheld the constitutionality of the statute as it related to sound recordings fixed and first published before February 15, 1972, on the ground that Congressional inaction concerning pre-1972 sound recordings did not preclude State action.

In reaching this decision, the Court did not preclude State action.

In reaching this decision, the Court did not specifically medify its earlier ruling in Sears v. Stiffel Co. 376 U.S. 225 (1964) and Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964) holding that the States could not protect

patentable subject matter against copying because of the conflict with the objectives of the patent (and inferentially the copyright) system. The Sears/Compco decisions did not, however, deal with copyright specifically, and this enabled the Court to reach a decision sustaining State law in the Goldstein case without touching on them. The rationale of Goldstein was applied in a recent case involving trade secrets, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974). Again, the Court did not overrule Sears/Compco, although there appear to be different views of the Federal system underlying these decisions.

ANALYSIS OF SECTION 301

Subsection (a)

Pre-emption of State common law or statutory copyright.—It is the intention of section 301 to pre-empt and abolish any right under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. In order to carry out this purpose an effort was made to draft section 301 in the clearest and most unequivocal language possible, so as to foreclose any possible misinterpretation of its unqualified intention that Congress shall act pre-emptively, and foreclose the development of vague borderline areas between State and Federal protection.

Exclusive Federal jurisdiction.—Under section 301(a), "all rights in the nature of copyright" (which are specified as "copyright, literary property rights, or any equivalent legal or equitable right") are governed exclusively by the Federal copyright statute if the work is of a kind covered by the statute. All corresponding State laws, whether common law or statutory, are pre-empted and abrogated. Regardless of when the work was created and whether it is published or unpublished, disseminated or undisseminated, in the public domain or copyrighted under the Federal statute, the States cannot offer it protection equivalent to copyright. Section 1338 of title 28, United States Code, also makes clear that any action involving rights under the Federal copyright law would come within the exclusive jurisdiction of the Federal courts.

Subsection (b): Rights not equivalent to Copyright Preserved.—Although States would be prevented from protecting works coming within the general subject matter categories of sections 102 and 103 against activities within the general area protected by copyright law, protection under State law continues in several important respects. Subsection (b) of section 301 explicitly lists three general areas left unaffected by the pre-emption: (1) unpublished material outside the subject of copyright; (2) causes of action arising under State law before the effective date of the statute; and (3) violations of rights that are not equivalent to any of the exclusive rights under copyright. Examples of the latter rights are actions for breach of contract, breach of trust, defamation, and deceptive trade practices.

In view of the recent Supreme Court decisions in the Goldstein and Kewance cases, referred to above, Congress should reconsider the wording of section 301, and subsection (b) in particular. The word "unpublished" in clause (1) of subsection (b) is probably inconsistent with the Goldstein decision, and additions to the specific references in clause (3) appear justified by this judicial trend.

DURATION OF COPYRIGHT

SECTIONS 302-305-DURATION

Summary

The present U.S. law with respect to the duration of copyright was enacted in 1909, but is based directly on a system dating back to the first copyright statute in history, the Statute of Anne adopted by the English Parliament in 1710. It has been retained as a relic of the past in this country long after it was abandoned in England, and long after England and almost every other country in the world has adopted a copyright term based on the life of the author.

U.S. copyright now endures for 28 years from the exact date of first publication, or, in the case of works registered in unpublished form, the date of registration. It can be renewed for a second period of 28 years. In one of the most fundamental changes in the revision bill, copyright protection would be based on the life of the author plus 50 years after the author's death, with exceptions for joint works, works of unknown authorship, and works made for hire.

Advantage of "Life-plus-fifty" system

Present term too short.—With the significant increase in life expectarcy since 1909, the longer term would ensure the opportunity or authors and their dependents to share, equitably in the economic benefits from their creative works. This

is especially important in view of new communications ter mology which has substantially lengthened the commercial life of a great make works. Often works of music, literature and art are not recognized for their true worth for decades; under the present system an author may well outlive his copyright and see his work fall into the public domain shortly after it becomes recognized and profitable for others.

International standards.—Nearly all countries in the world have copyright laws, and virtually all of them except the United States base their copyright term in the life of the author. A duration of the life of the author and fifty years after his death (sometimes referred to as "fifty years post mortem auctoris" or "50 years p.m.a.") became the governing international copyright term in 1928, and the 1948 Brussels revision of the International (Berne) Convention for the Protection of Literary and Artistic Works made this term a mandatory minimum for all member countries. A large majority of the world's industrialized countries have accepted or augmented this international standard.

As a practical matter it is to the advantage of American authors for the United States to adopt the same system. Copyrighted material moves across national borders more quickly and easily than any other economic commodity. The present and potential uses of new communications technology, including satellites, underscore the need for uniformity, thereby facilitating international dealings in copy-

righted materials.

Simplicity.—Duration of copyright is far simpler and easier to administer on the "life plus fifty" basis than on the present basis where the public must determine a multitude of publication dates and distinguish "old" from "new" material in later editions in order to use the work. With technological changes in the means of dissemination, the concept of "rublication" has become vague and often meaningless. Under the revision bill, all the works of an author would fall into the public domain at the same time, and the Copyright Office would maintain a registry of the dates when authors died.

Elimination of renewal requirement.—Another important, related feature of the revision bill is the elimination of the renewal system. The renewal provision of the current law is a highly technical and rigid formality, and it often results

in the unfair and unintended loss of copyright protection.

Section 302: Duration of works created after effective date of new law

Basic term.—Section 302 establishes the basic "life-plus-fifty" term for works created after the revision bill comes into effect, and provides special terms to cover cases where it is impossible or impracticable to base the term on a single individual's life.

Joint works.—In the case of joint works by two or more authors who did not work for hire, the fifty-year period is measured from the date of the death of the

last surviving author.

Anonymous and pseudonymous works.—In the case of an anonymous or pseudonymous work, the term endures for seventy-five years from the year of its first publication or one hundred years from the year of its creation, whichever expires first. If the identity of the anonymous or pseudonymous author is revealed in the records of a registration, the term would be based on the life of the identified author plus fifty years. In addition, any interested person may record a statement of death of an author of a copyrighted work, or statement that the author is still living on a particular date.

that the author is still living on a particular date.

Works made for hire.—A "work made for hire," which is defined in considerable detail in section 101, is also subject to a term of seventy-five years from first publication or one hundred years from creation, whichever is shorter. Since under section 201(b), the employer is considered the "author" of a "work made for hire," it would be inappropriate to base the term on the author's life in such

Presumption of author's death.—The bill also specifies that, after a period of seventy-five years after first publication or one hundred years after creation of a work, whichever expires first, users are entitled to rely on a presumption if they have no knowledge of whether or when a particular author died. Any person who obtains from the Copyright Office the proper document, indicating that the records disclose nothing to show that a particular author is still living or died less than fifty years before, is entitled to the pre——ion that the author has been dead for at least fifty years.

Section 303: Works created but not published or copyrighted before effective date

Since works still under common law protection on the effective date of the new statute will be brought under the federal law at that point, a question arises as to the term of federal protection to be given them. Constitutional due process questions could be raised if old unpublished works, theoretically protected perpetually under common law, were suddenly thrown into the public domain or given an unreasonably short term.

Thus, under section 303, pre-existing works that are not already in the public domain are given the regular copyright term provided in section 302, but with the proviso that under no circumstances would the term of protection expire before December 31, 2001 (25 years from the projected effective date). The provision also encourages publication by providing an additional twenty-five years of protection (through December 31, 1026) for works published before the end of 2001.

Section 304: Duration: subsisting copyrights

Section 304 is a transitional provision, but an important one. It deals with two types of subsisting copyrights: (1) those in their first twenty-eight year term, and (2) those already in their second, renewal term, including some copyrights whose renewal terms have been extended.

With respect to the first type, section 304 provides that any copyright subsisting in its first term on the effective date will continue to have a first term of 28 years from the date it was originally secured, with a right to a renewal term of 47 years, thus extending the total potential copyright term to 75 years. As under the present renewal system, application for the renewal term must be submitted within one year before expiration of the original term of copyright by the same specified renewal claimants. The reason for retaining the renewal provisions of the present law during this transitional period is that many of the present expectancies in these cases are the subject of existing contracts, and it would be unfair and confusing to cut off or alter these interests.

In the case of subsisting copyrights already in their renewal term when the new law comes into force, the term is automatically extended to a total of 75 years from the date when copyright was originally secured.

For both types of subsisting copyrights (those in their first 28-year term and those in their second, extended renewal, term), section 304 sets out detailed provisions governing the termination of grants conveying future interests in the extended terms. The approach is closely patterned on the reversion provisions of section 203. The objective is to permit the author or his statutory beneficiaries to receive the real benefit of the extended term. For this reason, they are given termination rights under specific conditions, including timely notice to the assignee. A five-year period is provided for effecting a termination, but it does not begin until 56 years have passed from the date copyright was originally secured. In this way, the contracts entered into on the basis of the present law remain unimpaired, but the assignee does not get a "windfall" through the extension of the term.

Section 305: Terminal date

Following the pattern adopted in many foreign laws, section 305 allows all copyright terms to run through the end of the year in which they would otherwise expire.

CHAPTER 4

COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION

General considerations

Chapter 4 provides for a substantial liberalization of the formalities required by the Copyright Act of 1909. The reforms in the areas of notice and registration are meant to reduce substantially any unfairness to authors who fail to meet these statutory requirements. Under the current statute, failure to comply strictly with the formalities resulted in harsh penalties, often the complete loss of copyright protection. The revision bill is intended to preserve the values of a system of notice, registration, and deposit while greatly ameliorating its barsh effects.

Summary of key provisions

Copyright notice.—The present law requires that, as a general condition of copyright protection, all published copies of a work bear a copyright notice (for example: "© 1975 Leonard Jones"). The revision bill calls for a notice on published copies, but omission or errors would not result in automatic forfeiture of the copyright and could be corrected within reasonable time limits. Innocent infringers misled by the omission or error would be protected from liability.

Deposit and registration.—Under the present law, deposit and registration are combined as copyright requirements for certain purposes. They are prerequisites to an infringement suit and can be demanded by the Register of Copyrights, but are not, strictly speaking, a condition of protection. The revision bill would make registration and deposit separate formalities which could, and usually would, be combined. Subject to certain exceptions, the extraordinary remedies of statutory damages and attorney's fees would not be obtainable for infringements occurring before registration is made. Works published with notice of copyright that are not registered are nevertheless subject to a mandatory deposit requirement. Deposit is not a condition of copyright protection, but failure to deposit after a demand by the Register of Copyrights can result in certain penalties.

SECTIONS 401-406-COPYRIGHT NOTICE

Policy considerations

Rigidity of present law.—One of the principal criticisms of the present copyright statute is directed at the rigidity and unfairness of the provisions requiring a notice of copyright as a condition of protection. Unintentional omission of the notice and comparatively small errors in its form and position have caused forfeiture in many cases. It has been argued that, because of the injustices, the notice requirements should be eliminated entirely.

Value of notice.—This objection to a notice system must be weighed against the four principal values of a copyright notice: (1) placing published material which no one desires to protect into the public domain at an early date; (2) showing whether a work is under copyright; (3) identifying the copyright owner; and (4) showing the year date of publication.

Proposed liberalization.—H.R. 2223 attempts to balance these opposing interests. It would retain the copyright notice in principle but would greatly lessen the penalty for an error in compliance with the statute, by allowing mistakes to be corrected without loss of protection. Also, it would relax the exacting specifications for the form and position of the notice by requiring only that the notice be placed "in such manner and location as to give reasonable notice of claim of copyright."

Conclusion.—In general, sections 401 through 406 represent an effort to preserve the values of the copyright notice by inducing its use, while substantially ameliorating the effects of accidental or even deliberate errors or omissions. Subject to certain safeguards for innocent infringers, protection would not be lost by the omission of notice from large numbers of copies or from a whole edition, if registration for the work is made before publication or within five years after publication.

Section 401: Notice on visually perceptible copies (Section 401)

General notice requirements.—Section 401 and 402 set out the basic notice requirements of the bill, the former dealing with "copies from which the work can be visually perceived," and the latter covering "phonorecords" of a "sound recording." The notice requirements established by these parallel provisions apply only when copies or phonorecords of the work are "publicly distributed."

Form and position.—Subsection (b) of section 401, which sets out the form of notice to appear on visually perceptible copies, retains the basic elements of the notice under the present law: the word "Copyright," the abbreviation "Copyright," or the symbol "©", the year of first publication, and the name of the copyright owner. By providing simply that the notice "shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright," subsection (c) follows the flexible approach of the Universal Copyright Convention.

Section 402: Notice on phonorecords of sound recordings

Special notice on phonorecords.—A special notice requirement, applicable only to sound recordings, is established by section 402. Since the bill would pro-

tect sound recordings as separate works, in lependent of protection for any literary or musical works embodied in them, there could be some confusion if the same notice requirements applied to sound recordings and to works they incorporate. Section 402 thus sets forth notice requirements for "phonorecords" of "sound recordings" that are different from those set by section 401 for the

"copies" of all other types of copyrightable works.

Form and position of phonorecord notice.—In general, the form of notice specified by section 402(b) consists of: the symbol "P"; the year of first publication of the sound recording; and the name of the copyright owner or an admissible variant. Under subsection (c), the notice for a sound recording may be affixed to the surface, label, or contained of the phonorecord "In such manner and location as to give reasonable notice of the claim of copyright." The symbol "P" has also been adopted as the international symbol for the protection of sound recordings by the 1972 Geneva Convention for the Protection of Producers of Phonograms, to which the United States is party.

Section 403: Notice for publications incorporating United States Government

Identification of Government works.—Section 403 would require a special notice for a publication that incorporates United States Government works. It provides that, when the copies or phonorecords consist "preponderantly of one or more works of the United States Government," the notice identify those parts of the work in which copyright is claimed, i.e., the "new matter" added to the uncopyrightable, United States Government work. A failure to meet this requirement would be treated as an omission of the notice, subject to the provisions of section 405.

Section 404: Notice for contributions to collective works

Collective works.—In conjunction with section 201 (c), section 404 deals with a serious problem under the present law: the notice requirements applicable to contributions published in periodicals and other collective works. The basic approach of the section is to permit but not require a separate contribution to bear its own notice and to make a single notice, covering the collective work as a whole, sufficient to satisfy the notice requirement for the separate contribution it contains.

Effect of error in notice.—Under this section, the rights in an individual contribution to a collective work would not generally be affected by the lack of a separate notice, as long as the collective work as a whole bears a notice. However, under section 494(b) a separate contribution that does not bear its own notice, and that is published in a collective work with a general notice containing the name of someone other than the copyright owner of the contribution, is treated as if it has been published with the wrong name in the notice.

Section 405: Omission of copyright notice

General provision.—The provisions of section 405(a) make clear that the notice requirements of sections 401, 402, and 403 are not absolute and that, unlike the present law, the outright omission of a copyright notice does not automatically forfeit protection and place the work into the public domain. Under the proposed law a work published without a notice will still be eligible for statutory protection for at least five year—whether the omission was partial or total, unintentional or deliberate.

Conditions for correcting error.—Section 405(a) provides that omission of notice does not invaligate the copyright if either of two conditions is met: (1) if "no more than a relatively small number" of copies or phonorecords have been publicly distributed without notice; or (2) if registration for the work has previously been made, or is made within five years after the publication without notice, and a reasonable effort is made to add notice to copies or phonorecords publicly distributed in the United States after the omission is discovered.

Effect on innocent infringer.—In addition to the possibility that copyright protection will be forfeited under section 405(a)(2) if the notice is omitted, a second major inducement to use of the notice is found in section 405(b). It provides that an innocent infringer who acts "in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted," and who proves that he was misled by the omission, is protected from liability for actual or statutory damages with respect to "any infringing acts committed before receiving actual notice" of registration.

Section 406: Error with respect to name or date in notice

Wrong name.—Under section 406(a), the use of the wrong name in the notice would not affect the validity or ownership of the copyright. However, unless the error had been corrected in the records of the Copyright Office, an innocent infringer misled by the notice would have a complete defense if he infringed under the apparent authority of the person named in the notice.

Wrong date.—The provisions of section 406(b) would preserve the validity of a copyright in the large majority of cases where an error has been made in the

date given in the notice.

Onission of name or date.—Where the copies contain no name or date that could reasonably be considered part of the notice, section 406(c) treats the work as if the entire notice had been omitted, as provided under section 405.

SECTIONS 407-412-DEPOSIT AND REGISTRATION REQUIREMENTS

General considerations

Sections 407 through 412 of the bill mark another departure from the present law, and they bring the United States closer in line with international practice. Under the current statute, deposit of copies for the collections of the Library of Congress and for purposes of copyright registration have been treated as the same thing. The bill's fundamental approach is to regard deposit and registration as separate though closely related requirements. Deposit of copies or phonorecords for the Library of Congress is mandatory. Copyright registration, as such, is not mandatory, but is a condition of certain remedies for copyright infringement. Deposit for the Library of Congress can be combined with copyright registration so as to serve the same purpose.

Section 407: Deposit for the Library of Congress

The basic requirement of the deposit provision, section 407, is that within three months after a work has been published with notice in the United States, the owner of the copyright must deposit two copies or phonorecords of the work in the Copyright Office. Exceptions to this requirement can be made under regulations aimed at meeting the needs of the Library of Congress and adjusting the deposit obligations to meet special situations. Failure to deposit after written demand makes the copyright owner liable to a fine and to reimbursement of the Library for the cost of the copies.

Section 408: Copyright registration in general

Registration permissive.—Under section 408(a), registration of a claim to copyright in any work, whether published or unpublished, can be made voluntarily by "the owner of copyright or of any exclusive right in the work" at any time during the copyright term. The claim may be registered in the Copyright Office by depositing the copies, phonorecords, or other material specified by subsections (b) and (c), together with an application and fee.

Deposit for registration.—In general, and subject to various exceptions, the material to be deposited for copyright registration consists of one complete copy or phonorecord of an unpublished work, and two complete copies or phonorecords of the best edition of a published work. Under section 408(b), a single deposit would satisfy both the deposit and registration requirements for a domestic work,

if it is made at the same time that the application and fee are filed.

Clussification and deposit regulations.—Section 408(c) allows the Register of Copyrights to specify "the administrative classes into which works are to be claced for purposes of deposit and registration." This subsection also gives the Register latitude in adjusting the type of material deposited to the needs of the registration system.

Section 409: Application for registration

Section 409, which lists the information to be included in an application for copyright registration, is intended to give the Register of Copyrights authority to elicit the information necessary to examine the application and to make a meaningful record of registration. This provision is similar to the current law except that it requests more extensive information about the work and the copyright claimant.

Section 410: Registration of claim and issuance of certificate

Basic registration authority.—Subsections (a) and (b) of section 410 set forth the two basic duties of the Register of Copyrights with respect to copyright

registration: (1) to register the claim and issue a certificate if he determines that "the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements . . . have been met," and (2) to refuse registration and notify the applicant if he determines that "the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason."

Prima facie effect.—The present law gives a certificate of registration status as prima facie evidence of the facts of a particular copyright. Section 410(c) retains this provision, but accords the certificate automatic prima facie status only if registration is made within five years after first publication. Where registration occurs after that time, the probative value of the certificate will be subject

to judicial discretion.

Section 411: Registration as prerequisite to infringement suit

Section 411(a) restates the present statutory requirement that registration must be made before a suit for copyright infringement is instituted. However, the new bill provides that a rejected claimant who has properly applied for registration may bring an infringement suit if he serves notice on the Register of Copyrights, thus allowing him to intervene in the suit. Section 411(b) deals with works that are being transmitted "live" at the same time they are being fixed in tangible form for the first time. Under certain circumstances, an infringement action could be maintained even before the work's fixation and registration.

Section 412: Registration as prerequisite to certain remedies

Although the registration system under the new bill is not obligatory, section 412 offers a strong incentive to copyright owners to make registration voluntarily, by providing a broader range of remedies in cases of infringement of a registered work. It would deny any award of the special or "extraordinary" remedies of statutory damages or attorney's fees where infringement of an unpublished work began before registration or where, in the case of a published work, infringement commenced after publication and before registration. But, if the work is registered within three months of first publication, there is no loss of rights.

CHAPTER S

MANUFACTURING REQUIREMENT AND IMPORTATION -

Section 601: Manufacturing requirement

General background.—Past efforts to revise the copyright statute have been impeded by the need to reconcile the interests of the American printing industry with those of authors and other copyright owners. The "manufacturing clause," which came into the copyright law as a compromise in 1891, requires in general that certain works be manufactured in the United States to receive full copyright protection here. The scope and effect of the provision have been gradually narrowed by successive amendments, but in its present form the requirement has often been criticized as discriminatory against American authors and detrimental to our international copyright relations.

The essential question raised by this provision is whether, as a means of protecting the American printing industry against foreign competition, it is necessary or justified to require domestic manufacture as a condition of copyright in writings by American authors published in books and periodicals. This basic issue remains unsettled. As a result, section 601 is a compromise measure aimed at achieving a reasonable balance between the opposing interests: the printing industry, and authors and publishers. It makes a number of modifications that would further narrow the coverage of the manufacturing clause, and would extend the present limit on importation of copies manufactured abroad from 1,500 to 2.000.

Present manufacturing requirement.—The present law requires, with a number of exceptions and qualifications, that English-language books and periodicals must be manufactured in the United States in order to be entitled to full-term copyright protection. At present, the main impact of this requirement falls on works by American authors, which in some cases fall into the public domain as a result of the failure to comply with the law's strict conditions. The Universal Copyright Convention presently exempts most foreign authors from the burden of the manufacturing clause.

Scope of requirement.—Section 601 would retain a manufacturing requirement, but with substantial revisions that would make its result less harsh. The scope

of the requirement would be much more limited than at present. It would apply only to "a work consisting preponderantly of non-dramatic literary material that is in the English language and is protected under this title." Therefore, it would not apply to dramatic, musical, pictorial, or graphic works, to foreign-language or multilingual works, to public domain material, or to works consisting preponderantly of material not subject to the manufacturing provisions. It would apply only to works by American citizens or domiciliaries, and would exempt works by Americans domiciled abroad for more than one year. One of the major compromises underlying section 601 is found in the provisions equating manufacture in Canada with manufacture in the United States for purposes of this measure.

Importation prohibition.—Like the present manufacturing clause, the purpose of section 601 is to induce the manufacture of an edition in the United States if more than a limited number of copies are to be distributed in this country. Subsection (a) thus provides that "the importation into or public distribution in the United States" of copies not complying with the manufacturing clause is prohibited. Subsection (b) sets out the exceptions to this prohibition. The importation of up to 2,000 copies of works not meeting the manufacturing requirement would be permitted. Additional exceptions to the importation prohibition include exceptions for copies destined for governmental use other than in schools, for copies intended for the library collections of non-profit scholarly, educational, or religious organizations, for works in Braille, and for one copy of a work intended for personal use.

Reproduction proofs.—An issue of great importance when this provision was under discussion in the mid-1960's involved the restrictions to be imposed on foreign typesetting or composition. The key inquiry here is what constitutes "manufacture in the United States." Under a possible loophole in the current law, some publishers have for years had their manuscripts set in type abroad, importing "reproduction proofs;" and then printing their books from offset plates "by a lithographic process... wholly performed within the limits of the United States." Whether or not this practice complies with the requirements now in effect is a matter of dispute, which was carried over as an issue in the revision

bill.

A compromise solution to this problem is found in subsection (c) where the manufacturing requirement is confined to. Liree specified manufacturing processes. Under this language, there would be nothing to prevent the importation of reproduction proofs as long as the plates from which the copies are printed are made here.

Effect of noncompliance.—Section 601(d) declares that compliance with the manufacturing requirements is not a condition of copyright, and that importation or public distribution of copies made abroad does not invalidate protection. The bill eliminates the present "ad interim" time limits and registration requirements and, even if copies are imported or distributed in violation of the new law, there would be no effect on the copyright owners right to make and distribute phonorecords of the work, to make derivative works including dramatizations and motion pictures, and to perform or display the work publicly.

At the same time, section 601(d) provides that it will be a complete defense, in any civil or criminal proceeding for infringement of the exclusive rights or reproduction or distribution of copies, where the defendant proves violation of the manufacturing requirements under certain circumstances. It places the full burden for proving the violation on the infringer. Subsection (e) requires the plaintiff in any infringement action involving publishing rights in material subject to the manufacturing clause to identify the manufacturers of the copies in his complaint.

Section 602: Infringing importation

Section 602 deals with two separate situations: importation of "piratical" copies or phonorecords, and unauthorized importation of copies or phonorecords that were lawfully made. Section 602(a) provides that in either case unauthorized importation is an infringement if the copies or phonorecords "have been acquired abroad." However, three exceptions to this general rule are set forth. They apply to importation for governmental use, for private use by an individual, and for library or archival use.

Importation of "piratical" copies is prohibited. However, although an unauthorized importer of lawfully-made copies would be liable for infringement, the Bureau of Customs would not be empowered to exclude the copies unless there

were, in addition, a violation of the manufacturing requirements. In both situations, the Customs Bureau is authorized to establish regulations under which copyright owners can be notified of apparent violations of their rights.

Section 603: Enforcement of importation prohibitions

Section 603 provides procedural authorization and guidelines for the enforcement of the importation prohibitions prescribed by sections 601 and 602 by the Secretary of the Treasury and the U.S. Postal Service.

CHAPTER 8

COPYRIGHT ROYALTY TRIBUNAL

Background and summary

The provisions for a Copyright Royalty Tribunal represent a relatively recent addition to the Copyright Revision Bill. Chapter 8 (sections 801–809) was not included in the revision bill passed by the House of Representatives in 1967. The proposal to create a Copyright Royalty Tribunal was first introduced in 1969, when the Senate Subcommittee on Patents, Trademarks, and Copyrights reported an amended version of the House-passed bill to the full Judiciary Committee. The Tribunal was created partly, though not entirely, in response to the efforts † reach a reasonable compromise with respect to the issue of cable televis a liability under the copyright law.

H.R. 2223 establishes compulsory licenses to use copyrighted works in three cases, in two of which the Register of Copyrights would be responsible for collecting and disbursing statutory royalty fees. If there is a controversy about the correct administrative distribution of the royalties the Royalty Tribunal would be constituted to settle it. In addition, two of the three compulsory licensing royalty rates are made subject to periodic review by the Tribunal, which can recommend to Congress appropriate adjustments in the amounts or schedules. The recommendations of the Royalty Tribunal for new statutory rates become law unless disapproved by either House of Congress within ninety days.

General considerations

H.R. 2223 establishes statutory royalty rates applying to retransmissions by cable television systems (section 111), the right to reproduce music in phonorecords (section 115), and performances on jukeboxes (section 116). In the case of jukebox and cable television uses, the amounts are to be paid to the Register of Copyrights, who will make distribution to the copyright owners of any amounts not in controversy, and will constitute a panel of the Tribunal to settle

any amounts whose division is in dispute.

On the question of the prescribed amounts of the rates for all three compulsory licenses (CATV, reproduction on records, and jukeboxes) the Senate Judiciary Committee Report on the proposal for the Royalty Tribunal stated that "sound public policy requires that rates specified in the statute shall be subject to periodic review." The Senate Committee felt that "it is neither feasible nor desirable that these rates should be adjusted exclusively by the normal legislative process," implying that it would be unwise to require that an act of Congress be passed every time an adjustment of one of these royalty rates is desired. Based upon these considerations, Chapter 8 of H.R. 2223 establishes in the Library of Congress a Copyright Royalty Tribunal for the dual purpose of making determination concerning the adjustment of statutory royalty rates and to make determinations in certain circumstances concerning the distribution of royalty fees deposited with the Register of Copyrights (except for the mechanical reproduction of music)." As a result of the Hollings amendment to the bill when it passed the Senate on September 9, 1974, however, the \$8.00 annual per box fee for jukebox performances was removed from the Tribunal's authority of periodic review.

The arguments for and against various aspects of the Tribunal's mandate are usually put forward in the context of one or the other of the substantive computary licensing systems, and relate more to them than to the Tribunal itself. In general, proponents of the concept of a Tribunal point out that compulsory licensing systems were essential to the solution of certain problems, and the best method of handling disputes arising under these systems is through a form of arbitration. They believe that this type of distribution system will facilitate payment, keep down administrative and legal costs, and provide a positive

benefit to the copyright system in this way.

A similar line of argument is used to justify the use of the Tribunal in the adjustment of statutory rates. The contention is that Congress neither has the time nor the expertise to deal with disputes over royalty rates, and yet it is unfair to proprietors and users alike to freeze royalty rates at arbitrary levels for indefinite periods. A form of "compulsory arbitration," it is argued, will be the most fair and efficient method of fee adjustment. One other factor is the apparent success of the "tribunal concept" in reviewing royalty rates in other nations. This system has been used in a number of countries to administer various sorts of performance royalties for many years.

One theoretical argument against the Tribunal is based upon opposition to compulsory licensing systems in general. Under compulsory licensing the author-proprietor has no right to control use of his intellectual property, which right has traditionally been considered equal, if not superior, to the right to receive compensation for uses. Compulsory licensing systems accommodate only the pecuniary right. So far the compulsory licensing systems in the bill have been established in areas where the author-proprietor had no rights to begin with, but concern exists that the Tribunal concept may grow into a device for substituting compulsory licensing systems for the concept of copyright as an "exclusive right" in the Constitutional sense, and for establishing a degree of government control over authorship.

Opposition to the authority of the Tribunal also comes from certain user groups, who argue that statutory royalty rates will inevitably go up whenever they are reviewed. It is argued that Congress should accept its responsibilities and should not delegate them to an unpredictable arbitration panel. Objection is also made by certain users to the hort period provided for review of the royalty rates. Finally, some opponents rather cynically contend that the Tribunal will not be able to reach fair determinations because of the strong pressures large, well-organized special interests will exert.

ANALYSIS OF CHAPTER 8

Section 801: Authority of the tribunal

Section 801 would establish the Tribunal as part of the Library of Congress. It would be empowered to adjust certain royalty fees established in other portions of the bill "to assure that such rates are reasonable," to change the rate or revenue basis if necessary, and to determine the distribution of royalty fees in cases of dispute.

Section 802: Petitions for adjustment of royalty rates

Periodic review.—Section 802(a) provides that on July 1, 1977 the Register of Copyright shall commence proceedings for a review of the rates of royalty payment specified in sections 111 and 115. During calendar year 1984, and in each subsequent fifth calendar year any owner or user of a copyrighted work whose royalty rates are initially specified by sections 111 and 115, or as previously adjusted by the Tribunal, may file a petition with the Register of Copyrights requesting an adjustment of the rate.

requesting an adjustment of the rate.

Decision to empanel Tribunal.—The Register shall make a determination as to whether the applicant has a significant interest in the royalty rate in which an adjustment is requested. If the Register determines that the retitioner has a significant interest, notice of this decision will be published in the Federal Register and the Register will proceed as provided in section 803 for the constitution of a panel of the Tribunal to consider an adjustment of the appropriate statutory rate.

Section 803: Membership of the Tribunal

List of arbitrators.—In accordance with sectic 802, or upon certifying the existence of a controversy concerning the distribution of royalty fees, the Register shall request the American Arbitration Association to furnish a list of

three members of the Association as potential arbitrators.

Appointment of Arbitrators.—The Register shall communicate the proposed names to all known parties of interest. The parties may submit written objections to any or all of the proposed names. If no objections are received, or if the Register determines that the objections are not well founded, he shall certify the appointment of the three arbitrators who would constitute a panel of the Tribunal for the consideration of the specified rate or royalty distribution. If the Register decides that the objections to the designation of any of the proposed

individuals are well founded, he shall request the American Arbitration Association to propose the necessary number of substitute individuals.

Section 804: Procedures of the Tribunal

Under section 804 the procedures of the Tribunal are broadly defined. It would generally be empowered to fix the time and place for its proceedings and to establish its own procedure. A panel of the Tribunal could hold hearings, administer oaths, and require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of documents. It is the intent of this legislation that the Tribunal complete each proceeding within one year from the certification of a panel.

Sections 805 and 806: Expenditures; reports

Section 805 provides that, in proceedings for the distribution of royalty fees, the compensation of the members of the Tribunal and other expenses shall be deducted prior to the distribution of the funds. However, in proceedings for the adjustment of royalty rates there is authorization for the appropriation of funds necessary for the compensation of the members and the expenses of the Tribunal. Section 806 requires the Tribunal, immediately upon making a rate determination, to report its decision and reasons to the appropriate Congressional officers.

Section 807: Effective date of royalty adjustment and congressional review

No recommendation of the Tribunal for adjustment—a statutory royalty rate shall become effective until Congress has had the opportunity to determine whether the proposed adjustment should be disapproved. Section 807 establishes a procedure, modeled on the Reorganization Act, whereby within ninety calendar days of continuous session either House of Congress may adopt a resolution stating that the recommended royalty adjustment is not favored. If such a resolution is adopted by either House of Congress the adjustment shall not become effective. If neither House adopts a resolution of disapproval, the rate adjustment shall take effect after the expiration of a specified period of time.

Sections 800 and 809: Effective date of royalty distribution; judicial review

Section 808 provides that a final determination of the Tribunal concerning the distribution of royalty fees pursuant to sections 111 and 116 becomes effective as to a particular claimant 30 days following the communication to the claimant of written notice of the determination, unless an application for judicial review has been filed and notice of the application has been served upon the Register of Copyrights.

Section 869 is modeled on the Federal Arbitration Act and provides that the determinations of the Tribunal shall not be subject to review in any Federal court unless: (1) the determination was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in any member of the Tribunal; or (3) any member of the Tribunal was guilty of any misconduct by which the rights of any party were prejudiced.

CHAPTERS 5, 7, AND TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

MISCELLANEOUS PROVISIONS

Only one major issue has been raised in connection with provisions of Chapter 5 (Copyright Infringement and Remedies), Chapter 7 (Copyright Office), and Sections 102 through 113 (Transitional and Supplementary Provisions), and this is a part of the entire problem of cable television. Subsection (c) of section 501 provides that "a television broadcast station holding a copyright or other license to transmit or perform the same version of that work" is to be treated, for purposes of maintaining an infringement suit in a case of CATV retransmission, as the copyright owner if the infringing transmission "occurs within its local service area." Cable operators have challenged this provision, and their arguments should be considered in connection with the other problems raised in connection with sec' on 111.

The fees for registrations and other Copyright Office services are provided in section 708, and remain at the level set in the 1965 bill and established by special statute in that year. It is for consideration as to whether changes in these fee levels, and in other of the provisions in the fee section, should be reexamined with, or in advance of, the general revision bill.

APPENDIX 3

REPORT OF WORKING GROUP OF CONFERENCE ON RESOLUTION OF COPYRIGHT ISSUES (DEALING WITH LIBRARY PHOTOCOPYNG)

APRIL 17, 1975.

To: Conference on Resolution of Copyright Issues. From: Working Group.

Subject: Activities of Working Group since Feb. 5, 1975—Actions of Working Group & Its Committees—Recommendations.

§ 1. Introduction.—Efforts between Nov. 1974 and Jan. 1975 to solve the problem of achieving meaningful consensus concerning compensation by libraries to copyright proprietors for photocopying of copyrighted periodical and journal articles made by librarians for their patrons had made no progress through an approach to a de nition of systematic copying or through discussion of examples. This led to the summary report and recommendation by the Working Group (WG) to the Conference at its Feb. 5, 1975 meeting. The Conference adopted the Recommendation of the Working Group:

"a. That the Conference investigate the development of workable clearance and licensing procedures, or other procedures, applicable to library photocopying

of periodical and journal articles, and

"b. That the Conference direct the Working Group, or a reconstituted Working Group, to proceed with such investigation as rapidly as possible and, in this connection, authorize the Working Group to utilize such expertise as is available from organizations represented at the Conference or such other informational or technical resources at its command."

In making this recommendation, the members of the Working Group considered "that it was presently impossible to achieve any meaningful consensus concerning the existence of any obligation of libraries to compensate copyright proprietors for the photocopies of copyrighted periodical and journal articles made by libraries for their patrons", but that discussions could proceed with "all parties reserving their respective rights and positions as to the obligation of libraries to compensate copyright proprietors for photocopies . . ."

Therefore, the WG has operated since Feb. 5 in response to the above action of the Conference. The Working Group has met 3 times. In addition, there were 4 meetings of committees appointed by the WG; committee members included persons as technical advisers who were not members of the WG or of the Conference. Nine Agenda Documents were prepared by the committees and by the library com-

ponent and publisher component of the WG.

Because an assignment to one committee was often interrelated with other assignments, it is difficult to present a relatively simple list of actions of the WG. In some cases, the WG amended portions of a document without a final action by the WG. Therefore copies of the Agenda Documents are appended to this report so that Conference members can see the rationale presented in each document.

§2. Summary

§2.1 Terminology.—Because the words, system and systematic, have several possible interpretations, the WG agreed to eliminate the use of these two words. The word, mechanism, has been used in a number of instances (e.g. in reference to portions of AgenDoc 5) so as to avoid the use of the word, system, in such contexts.

§ 2.2 Definition of Serials (Periodicels).—The WG accepted a definition of serials prepared by a committee for purposes of defining a serial; and that at a later date a determination would be made whether any payment mechanisms

will apply to all serials or only to certain categories of serials:

Serial.—A publication issued in successive parts bearing numerical or chronological designations, which is intended to be continued indefinitely and which is identified by an ISSN. Serials include periodicals, newspapers, and the journals, memoirs, proceedings, transactions, etc. of societies. Serials are subject to subscription prices paid in advance. (This eliminates publications that appear annually or less frequently.) (See AgenDoc 7)

§ 2.3 Variable Pricing vs. Transaction or Usage Charges.—A list of advantages and disadvantages for both approaches were prepared by a committee and considered by the WG. All lists include items that are advantages and disadvan-

tages to publishers and/or libraries. The definitions are:

Variable pricing.—This should refer to any system under which separate prices may be established by the publisher for each serial or periodical for various classes of customer. The price set for a particular class of customer could be

based on the subscriber's status or could relate to the usage of the material; such as for a library not carrying out photocopying. :tivities, a library doing modest

photocopying or a library doing a large amount of photocopying:

Transaction or usage charges.—This should refer to any method by which royalties or payments are directly related to individual instances of photocopying or duplicating material by any means. Such royalties or payments will be according to a specified charge per unit. (These royalties or payments may vary from publication to publication and would be established by the publisher; the royalty charges escablished for the copying of a particular item or unit would be the same for all libraries.) The transaction or usage charges are independent of any subscription price charged by a publisher.

The lists were compiled with awareness of the absence of certain necessary information and the need for some study of the impact of both systems on the future operations of libraries, on the business of publishers, and on the dissemination of

knowledge. (See AgenDoc 6)

§ 2.4 Mcchanism for Royalty Payments, Data Collection and Related Criteria.—A document, "Mechanisms and Criteria for Royalty Payments and/or Clearance and Licensing Procedures," was submitted by the Library Component. A document, "Elements in Photocopy Transactions," was submitted by the Publisher Component. A study of the two documents by the WG was assisted by a committee and resulted in the development of 4 major points by the WG (AgenDocs 8,

Point 1.--Any mechanism must provide a method for the user to determine whether the contemplated copying falls within the inclusive dates of a stated fee

period.

Point 2.- A system based exclusively on duplicate copies of the first page of the copied journal article in "hard copy" does not provide a royalty payment mechanism for copying accomplished in microfilm, telefax, video, etc.

Point 3.—It is recognized that there are costs to the library intrinsic to a royalty payment mechanism. If these costs can be clearly defined, it must be deter-

mined how the costs shall be borne.

Point 4.—The mechanism was evaluated for interlibrary copy transactions. No evaluation was made of either the criteria or the mechanism for other than

interlibrary copy transactions.

- § 2.5 Proposed Statistical Study and Test of a Payment Mechanism.—That the Conference recommend to NCLIS that NCLIS assume responsibility for financing and co-sponsoring with the Conference a study such as suggested in AgenDoc 9 with an understanding that such a study would include some testing of a payment mechanism.
- § 3 Queries to Conference.—It is appropriate for the Working Group to ask the Conference:
 - (a) If the present Working Group should continue or if the Conference wishes to designate other members; and
 - (b) To give guidance to the Working Group regarding items not yet resolved; and

(c) To define other items to be investigated.

Prepared by:

RICHARD L. KENYCH. FRANK E. MCKENNA.

AGENDA DOCUMENTS APPENDED TO APR. 17, 1975, REPORT OF WORKING GROUP

Agenda document No.	Title	Submitted by—
1	Proposals for procedures at meetings of the working	F. E. McKenna.
3	group. Definition of serials (periodicals) Mechanism and criteria for royally payments and/or criteria and licensing procedure.	Do.
4	criteria and licensing procedure. Interim report.	Committee to Consider Definition of Serials (periodicals).
5	renceting photocopy for payment of convertet face	Publisher component.
6	Report.	Committee to Compare Variable Pricing and Transaction or Usage Charge.
7	do	Committee to Consider Definition of Serials
8	do	(periodicals). Committee to Consider Agenda Documents.
9	Recommendation re collection of test data	3 and 5. Robert Wedgeworth.

Actions of the Working Group. Because the WG treated various documents and their recommendations in several different ways, some of the WG actions are reported here in addition to those reports that were accepted (See § 2.2

Adopted Without Vote.

AgenDoo 1.—Proposals for Procedures at Meetings of the Working Group (WG-3/4/75).

RECEIVED A REPORT OR RECOMMENDATION

AgenDoc 6.—Received the document after amending Disadvantage 7 of Varia-

ble Pricing to read:

(7) There is no necessary relation between the subscription price and the amount of photocopying. Therefore a single photocopying subscription price causes libraries preparing few photocopies to subsidize those libraries preparing many photocopies. Some publishers may be undercompensated and other publishers may be overcompensated.

und after adding Disadvantage 10 to Variable Pricing:

(10) The publisher may establish prices that are so high so as to restrict usage of material.

and after adding Disadvantage 3 to Transaction or Usage Charges:

(9) The publisher may establish prices that are so high so as to restrict

usage of material.

AgenDoc 8.—Received the document as amended by the Working Group, and noted the 2 Appendixes without prejudice. (Note: This document refers to AgenDocs 3 & 5.)

After replacing the text of Point 1 with:

Point 1.—Any mechanism must provide a method for the user to determine whether the contemplated copying falls within the inclusive dates of a stated fee period.

and replacing the text of Point 3 with:

Point 3.—It is recognized that there are costs to the library intrinsic to a royalty payment mechanism. If these costs can be clearly defined, it must be determined how the costs shall be borne.

and eliminating Points 4 & 5

and renumbering Frint 6 as Point 4 and replacing that tert with:

Point 4.—The mechanism was evaluated for interlibrary copy transactions. No evaluation was made of either the criteria or the mechanism for other than interlibrary copy transactions.

and amending Appendix A, Criterion 4(e) to read:

(4c) Definition of inclusive period needs further work (see Committee Point 1). It was noted that copyright constitutes a bundle of rights and that establishing a specified fee period for single copy copying does not mean publisher gives up other rights in copyright.

and amending Appendix B, Items I, IIB & III to read:

I. The title of the Flow Charts at p. 2 & 4 and elsewhere should read: "Elements in Photocopy Transactions."

IIB. An overlay of the ILL or copy request form which would provide data elements 7 and 10 as well as others. This was the publishers' preferred method, but it would be expected that data element 1 would, in many cases, be obliterated so as to protect the privacy of the user. This method would assure that each document contains reference to data elements 7 & 10.

III. An additional data element 12 providing the "inclusive date" for fee payment (see committee Point 1). This, like data elements 4, 8 and 11, would be preprinted on the first page of each article by the publisher. Thus, the mechanism is understood to call for the publisher to preprint data elements 4, 8, 11 and 12 on the first page of each article to signify its participation in the mechanism.

> SPECIAL LIBRARIES ASSOCIATION, New York. February 19, 1976.

To: Working Group, Conference on Resolution of Copyright Issues, From: F. E. McKenna.
Subject: Proposals for Procedures at Meetings of the Working Group.

Because I criticized the apparent lack of procedures at past meetings, I am presenting the following for agreement or modification to serve as a guide for future meetings.

(1) That it be understood that no specific action by any one individual or group of individuals at a meeting of the Working Group be binding on his constituents; that such a statement be made at the beginning of each meeting and appear in the Minutes of each meeting (instead of repetitious statements to this effect during the course of each meeting).

(2) That discussion be limited to one Agenda Item at a time rather than the past practice to recognize speakers in the sequence of their signals to the chairman (which ultimately prevents an orderly sequential discussion of every topic).

(3) That comments on any one Agenda Item be limited to one presentation per member until all members desiring to comment have each made one presentation; and that each member be restricted to one additional comment of not more than 5 minutes, unless there is general consent for other comments.

(4) That when action on a specific topic can be presented in the form of a motion for action by the Working Group, that a vote be taken. Suggested sample

limitations on such motions are:

(a) Motion to Approve/Disapprove/Take no action.

(b) Motion to Amend:

(c) Motion to Postpone Consideration until a later Agenda Item or until

the next meeting of the Working Group.

- (d) Motion to Refer to a Subcommittee of the Working Group and/or external technical experts; the motions to include a date for report back to the Working Group.
- (e) Because new information presented at a future time may affect an earlier decision, ... may be necessary to reconsider such an earlier decision.

(f) Motions should be presented in writing.

- (\hat{g}) Because the two components of the Working Group may not agree on an action or a specific topic, the corresponding Minute should show a division.
- (5) That the Minutes of meetings of the Working Group not be narrative accounts of comments by individuals (that is, like a transcript); but that a Minute be recorded for each Motion, plus a Minute recorded for each topic discussed or report considered without specific action. Examples are:

M.1. Voted to Approve a Motion that ...
M.2 Voted to Refer to a Subcommittee . . . to . . . and to report on . . .

M.3. Considered Without Action a report...etc.
(6) That Draft Minutes of the Working Group be circulated to members of the Working Group for comment as soon after the meeting as possible (but no more than 7 working days); and that copies of the Draft Minutes and copies of the finally approved Minutes (each suitably identified) also be sent to the Copyright Office and to NCLIS

> SPECIAL LIBRARIES ASSOCIATION, New York, February 20, 1975.

To: Working Group Conference on Resolution of Copyright Issues.

From: Library Component of Working Group. Subject: Definition of Serials (Periodicals).

Paragraph (a) of the "Summary Report and Recommendations of the Working Group . . ." as submitted and approved by the members of the Conference states:

. applicable to library photocopying of periodical and journal

articles . . .' Therefore it seems essential that the Working Group agree on the materials included in the words, "periodical and journal." Limitations as to the subject coverage of the publications were not included in the recommendation as submitted

Within the total library community, and for many years, it has been difficult to reach an acceptable definition of "periodicals" and/or "journals." The term, "serials," has found a more readily and commonly acceptable definition. Even though some variations in definitions have been put forth for "serials," such variants are closer to one another than proposed definitions for "journals," etc. The significance of terms in publishers' titles are often in apparent conflict with the actual contents.

Further, most libraries have a "Serials Department." Therefore the use of such a term will probably be more readily understood and accepted by library staffs.

Recommendation 1. That discussions of the Working Group use the term, "serials," rather than journate periodicals, etc.

Recommendation 2. That he following qualifications be accepted as the basis for categorization as a serial. A serial must meet all four qualifications:

(2a) Must be published periodically and/or issued in successive parts; ¹ (2b) Must not be superseded by forthcoming editions; ²

¹ Thus irregular or non-periodical issues are included. ² Thus monographs are excluded.

(2c) Must have a definite system of consecutive numbering; and (2d) Must not have a stated or logical predetermined ending.³

The above automatically excludes 1) publishers' monograph series, and 2) progress reports of individual projects or contracts. Internal house organs are to be excluded. Also excluded are government documents (local, state, federal, foreign or international) which do not meet the 4 above qualifications for serials. Loose-leaf business services may or may not meet all 4 qualifications. Near-print statistical reports (daily or weekly) are excluded.

Possible categories of serials.—A number of different "family trees" can be constructed for "serials." The different trees depend on the mode of classification selected (see p. 3). Because requests for photocopies are normally handled

at a clerical level without individually supervised decisions, the simplest generalized category should be chosen to avoid the need for intervention for decisions by non-clerical library staff (i.e. higher salaried supervisors or administrators).

Serials (I) will normally come from serials collections or documents collections to the photocopying service. Therefore there should be a minimal decision process

by clerical personnel.

Serials (II) requires a recognition of 28 years, 56 years, author's lifetime, or the like. Because a publisher's numbered volume may have so many pages that the library will bind one publisher's volume as two or more physical bindings, the library-bound volume (containing the item ordered by the library user) may not contain a copyright notice and date. Even more frequently, the copyright notices in issues of a serial are printed on preliminary pages of each issue (together with postal forwarding instructions) that such preliminary pages (small Roman numerals) are removed by the binder—and no copyright notice may appear in any bound volume. On the other hand, a library binding may encompass more than one publisher's volume or one year.

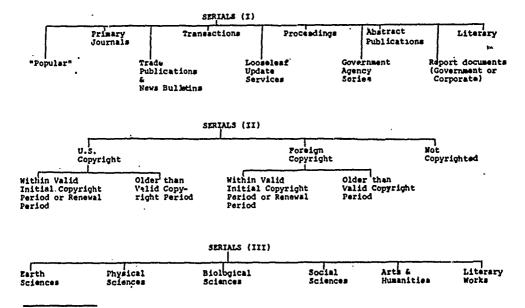
Serials (III).—Attempts to subdivide man's knowledge into discrete packages or cells have always failed. This is the cause of dissatisfaction of library users who expect to find all titles to a specific subject area shelved next to one another. It is also one cause of librarians' dissatisfaction with each classification scheme (e.g., Dewey, Library of Congress, Universal Decimal Classification).

Perhaps an extreme example is "thermodynamics" which (depending on focus) could be considered as physics, chemistry, or mechanical engineering (among others). Emerging subject areas also result in extreme uncertainties; for example, publications in neuropsychobiology.

Here again, clerical personnel (who rarely are more than high school grad-

uates) cannot make independent judgments as to subject area.

Recommendation 3.—That the most general definition of "serials" be used (that is Recommendation 2) rather than any categorization by subject area.



³ Thus encyclopaedias are excluded.

Special Libraries Association, New York, February 20, 1975.

To: Working Group Conference on Resolution of Copyright Issues.

From: Library Component of Working Group.

Subject: Mechanisms and criteria for royalty payments and/or clearance and licensing procedures.

There are general assumptions that the internal procedures of libraries are very similar, if not identical. Such assumptions are held by some librarians themselves. In actual existence there are almost as many variations in purchasing procedures or in billing procedures for services rendered (for example, the preparation of photocopies, literature search services, etc.) as there are libraries.

Financial procedures, such as purchasing or billing (and their costs), are most frequently defined by the library's parent organization: a city or state government, an academic institution, an endowment, a corporation, etc. To attempt to define a uniform reporting mechanism for photocopy royalty purposes based on existing billing processes may well be self-defeating because the wide range of parent organizations will not want to change established procedures (which are also used in nonlibrary activities of the parent organization).

To insert the reporting mechanism at the point of preparation of the photo-

To insert the reporting mechanism at the point of preparation of the photocopy may be possible, but the reporting mechanism must meet some minimum criteria by libraries. Some of these criteria have been mentioned in earlier discussions, but additional criteria may become evident as discussions become more

specific.

When discussed in broad terms, there are frequent admonitions to plan to use new technology (usually implying computers). It must be remembered that only a small fraction of libraries today have either their own computers or access to a computer located in another part of their parent organization. At present and in the foreseeable future, library budgets are at minimum levels to maintain their collections. Unless large additional sums are forthcoming from the federal government, it is difficult to foresee the general availability of computers in all types and all sizes of libraries.

Criterion 1.—The interface between libraries and publishers in the mechanisms for the reporting and paying of photocopy royalties must be able to accom-

modate both manual input and computer input.

Note: Because there are already unfortunate misunderstandings attached to "system" and "systematic," it is suggested that the word "mechanism" be used in these discussions rather than "system."

Criterion 2.—That the development of possible new mechanisms be the initial responsibility of the publishers recognizing the need to meet the criteria for the

mechanism's interface with libraries.

The preponderance of photocopy requests go directly to a clerical employee (a stack-boy to pull the volume and a photocopy machine operator to prepare the copy) without direct intervention of a supervisory or administrative librarian (unless there is uncertainty of the identity of the item requested). Unless the library's administrative costs are to be inflated, royalty payment identification must be easily understood by the library clerical personnel who normally process photocopy requests from users.

Criterion 3.—To achieve proper reporting and payment of royalties, individual items (e.g., any one article in any issue of a copyrighted serial) must be clearly

identified that such photocopies are subject to royalty payments.

The actual act of publication is under the control of the publishers; and the final stage of receiving royalties will be within the control of the publishers. Thus with both ends of the cycle under the control of the publisher, it seems logical that the entire new mechanism be planned by the publishers with such allowance that the interface of the mechanism with libraries for royalty payment purposes meet the criteria delineated by libraries.

Because such a mechanism is new in the operations of publishers, it would seem easier to define the parameters of such a new mechanism within the domain of the publishers, rather than to attempt to define parameters in terms of the

variable and long-established procedures in and among libraries.

Criterion 4.—That the following specifications for the mechanism's interface with libraries be considered in developments resulting from Criteria 1, 2 and 3 (4a) Ready and timely access by the user to materials which he requires.

(4b) Specific and clear identification of items that do require or do not require royalty payment when photocopied.

(4c) Clear identification of the inclusive period (specific dates) during which

royalty payments are required (as part of 4b above).

(4d) Clear identification of the defined royalty payment (as part of 4b above) for the information of both the user and the library; and that the royalty payment not be changed by the publisher after the issue is in print.

(4e) All notices (as in 4b, 4c and 4d) must be printed in normal readable type; if optical character recognition codes are desired, they may be used but must be

accompanied by a readable interpretation of the codes.

(4f) The mechanism must not impose costly or complex procedures on

libraries, nor interfere with normal library services or practices.

(4g) The mechanism's interface with libraries must be able to accept input from all kinds of libraries, for instance, manual input or computer input. In the case of computer input, the mechanism's characteristics must be such that it can interface with the Lifferent kinds of computers in libraries without the need for installation of costly interfacing equipment in libraries.

*: Serials can be categorized by their subscription requirements. Some of these could result in uncertainties as to whether a fee has already been paid thru a licensing agreement, for example:

Paid subscriptions: Single pricing to all subscribers; Variable pricing: To individuals (as members or non-members), To libraries (including license to photocopy), Service basis; Government publications. Free Subscriptions: Unrestricted as to recipients; Special Distribution Lists (e.g. house organs); Controlled Circulation (Restrictions as to work done by recipients or positions held, but almost invariably excluding libraries); Government publications.

Because such distinctions may not appear in the bound volume, the notice in Criterion 4d must clearly identify those items or titles which do not require

royalty payments because of the pricing differential for library subscriptions. Criterion 5.—That the form of identification and standardization be defined by statute or regulation; and when such defined identification is absent no royalty payments are required.

> SPECIAL LIBRARIES ASSOCIATION. New York, N.Y., March 14, 1975.

To: Working Group Conference on Resolution of Copyright Issues.

From: F. E. McKenna, Co-Chairman.

Subject: Committee to Consider Definition of Serials (Periodicals).

On March 13 the Committee to Consider the Definition of Serials (Periodicals) as presented in AgenDoc 2 of the March 4, 1975 meeting met at New York Public Library. Those present were James Barsky, Paul Fasana, Michael Harris and Frank McKenna. Julius Marke who had been designated as a member of the Committee apparently was unable to attend; therefore Paul Fasana participated in the discussion.

This report is a progress report without any recommendation at this time. The Agenda Document had been submitted by the Library Component based on a premise that identity as a serial should require a minimum need for determination by clerical employees in libraries. Discussion indicated that the usage and connotations applied to the words "serials" and "periodicals" were quite different in the publishing community and in the library community. Tentative attempts to amend Recommendation 2, either by addition or subtraction failed to specify one or the other of the two components represented at the meeting.

Mr. Fasana, who had kindly offered the use of his office for the meeting, had also prepared a number of examples for consideration by the Committee, A wide range of serials (periodicals) received by New York Public Library and treated by NYPL as serials were examined. This examination indicated that attempts to select appropriate terminology and definition would require additional corrida

eration and work.

One important item that was made available was a book (Osborn, Andrew D.: Serial Publications, 2d ed. ALA, Chicago. 1973. \$6.00.) The first chapter of this book (p. 3-19) is titled "Definition of a Serial." A quick survey of this chapter suggested to the Committee that all members of the Working Group might well read this chapter for a better understanding of the problem. Therefore, there is

enclosed a copy of the above chapter.

The Committee intends to meet again between the two presently scheduled meetings of the Working Group (Mar 19 and Apr 11); the actual date has not yet been fixed.

F. E. MCKENNA.

[From Osborne Serial Publications 2d edition Ala. 1973]

DEFINITION OF A SERIAL

The elements which, by and large, constitute a serial publication are: (1) a name and (2) either periodical or serial numbering of the successive parts of the work which are issued under that name or under the name which eventually comes to replace the earlier one. The qualification "by and large" is significant because once in a while the name of the serial is lacking, as are more frequently the elements of periodical or serial numbering, yet a work which is defective in any or all of these ways can still be regarded in libraries as a serial. On the other hand, all elements can be present, but the publication may be considered by librarians to be a book.

Quite often the name of a serial is a brief, striking word designed simply for publicity purposes, e.g. Choice, Life, Nature, Time. Sometimes it indicates the subject coverage in a very broad way, e.g., American Libraries, Philosophy of Science, School and Society. At times an expression is incorporate. I in the name to emphasize the serial character of the work, such as "annual report," "bulletin," "journal," or 'review": e.g., L.nnucl Report on the Progress of Chemistry, Bulletin of Bibliography. The Journal of Philosophy, and American Historical Review. In cataloging circles there is an established practice which says that generic terms such as "annual report" and "journal" may not be used as a title main entry or a title added entry when for the sake of meaning they must be eked out by the addition of the name of a corporate body. The practice holds in most libraries, even when usage in the field is clearly otherwise; this can be seen from an acronym such as JAMA, which indicates that medical people, unlike librarians in general, think of Journal of the American Medical Association as a name in its own right." Names, too, are subject to constant change; American Libraries was formerly the ALA Bulletin, and the Saturday Review of Literature shortened its name to Sate lay Review for the sake of terseness and because its scope was somewhat wider than the world of books.

Periodicity is expressed in serials by means of dates, principally day, month, quarter, or year. There are many variations, however. For example, a quarterly published in the Northern Hemisphere may call the four issues "Winter," "Spring," "Summer," and "Fall," while one in the Southern Hemisphere may say "Summer," "Autumn," "Winter," and "Spring"; or the quarters may be designated by the month in which the issue normally appears, giving a sequence such as January, April, July, October; or they may be numbered: first, second, third, and fourth quarter. Especially on annual, biennial, and triennial reports and budget statements, the date as given on a publication may or may not represent the calendar year, with the notational consequence that im libraries the form 1970-71 is used to cover two full calendar years whereas 1970/71-1971/72 serves to cover twenty-four months of divided years. In any event, from the idea of periodicity, of parts issued periodically, whether regularly or in egularly,

¹ Two examples of serials without titles are given by K. I. Porter, "Standards for the Presentation of Information, with Particular Reference to Serial Publications," in Bernard Houghton, ed., Standardization for Documentation (London: Bingley, 1969), p. 35. He says that "List and Index Society" implies but does not state a word such as Publications as the title, and that "Air Force Cambridge Research Laboratories" is in effect the annual report of that body and requires those words in its title.

² Some medical libraries constitute an exception to the general library practice. The Harvard Medical Library lists and shelves the JAMA under its title, not under the name of the association (see Ann T. Curran, "The Mechanization of the Serial Records for the Moving; and Merging of the Boston Medical and Harvard Medical Serials," Library Resources & Technical Services 10: 362 [1966]). Lela Spanier says, "Medical librarians generally seem to consider title listing superior to the use of corporate entries for serials with non-distinctive titles" (Lela M. Spanier, comp., Biomedical Serials, 1950–1960, a Selective List of Serials in the National Library of Medicine [Washington, 1962], p. v).

there arises the concept of a periodical. Essentially, then, a periodical is a work whose parts are issued periodically, that is, whose parts bear dates of one kind or another. From the point of view of the Anglo-American cataloging code, though, there is a limitation: for an item to be considered a periodical, it must be issued more frequently than once a year. So, on technical grounds, an annual, bienrial, or trienmial is regarded by catalogers as a serial publication, not a periodical. On the other hand, the North American text of the cataloging code excludes newspapers from its definition of periodicals, whereas the British text includes them.

Seriality is most commonly expressed on publications by means of cardinal numbers in the form of arabic numerals. Present-day practice in libraries is to convert roman numerals into arabic for record purposes and on bindings. Ordinal numbers tend to be found on annual reports, the sessional papers of international and other recurring conferences, and in other cases when the numeral in the edition statement is pressed into service as the numbering device for the serial publication. As with dates, there can be complications with numbers, and this quite apart from mistakes in numbering, which are fairly frequent on the issues of newspapers. It is not uncommon for a serial publication to have more than one set of numbers. An issue can be called volume 10, part 6, or it can carry one number because it is part of a main series and another number because it is at the same time part of a subseries. When only one term is on the issue itself, it is customary to omit the word "volume" or its equivalent from library records and bindings, but in compound situations each of the terms may be given along with the numbers. Occasionally letters are substituted for numerals, especially in the subdivisions of learned society and other scientific publications. So the Journal of Polymer Science is subarranged by letters: part A-1, polymer chemistry; A-2, polymer physics; B, polymer letters; and C, polymer symposia.

Often both periodical and serial numbers occur on one and the same item. The

Often both periodical and serial numbers occur on one and the same item. The numbers then duplicate each other, at least as far as concerns either the arrangement of the parts of a volume or the posting on library checking records. The dual system is followed extensively in the United States because it is required by

the regulations which govern second-class mailing privileges.

In themselves the characteristics of periodicity and seriality are not always sufficient to distinguish between a serial publication and a nonserial work which (1) looks as though it may be the first volume of a new serial or (2) is issued in parts, sometimes as unbound numbers, sometimes, as a bound volume in what will eventually be completed as a monographic set. Schneider put his finger on two factors which in doubtful cases could possibly aid in distinguishing serials from nonserials. He found the first difference between the two types of material in the publication program for serials: "By nature they are unlimited. They may be suspended, but they do not conclude. External circumstances, but scarcely exhaustion of the subje. 'ring about their end. A second difference lies in the number of their authors. Apart from collections and composite works, books possess more than one author only by way of exception. With periodicals it is the reverse."

Handover expresses the bibliographer's point of view when she says: "It is obvious that a periodical publication differs in format from a book, and that it does so because it must be printed and distributed at regular intervals; the shorter the intervals the greater the distinction in format. Because these publications must be produced regularly, the price must be kept low; the more frequent the intervals, the lower the price. It is periodicity that distinguishes newspapers, journals, magazines, reviews and even some annuals from books and from jobbing (posters, cards, tickets, etc.), and it is periodicity that dictates format and price.

"Moreover, a periodical publication is distinguished from a book or a piece of jobbing because it is dated and numbered. By giving this information the publisher indicates that at a certain interval the next number will appear. The method of dating often reveals this interval: daily, weekly, monthly or quarterly, The number identifies the place in the series and also serves as a promise by the publisher to produce further numbers."

Schneider and Handover, working toward the definition of a serial, reflect the needs of the bibliographer and historian, both of whom require guidance as

³ Georg Schneider, Handbuch der Bibliographie (4th ed., Leipzig. (Hiersemann, 1930), p. 369.

⁴P. M. Handover, Printing in London from 1476 to Modern Times (London: Allen & Unwin, 1960), p. 98-99.

they face problems of inclusion and exclusion in their bibliographical and historical studies. But these scholars tend to represent a world in which there are inherent difficulties in sorting out the forerunners of serial publications from conventional serials, difficulties which pervade research into ancient, medieval, and more particularly early modern works. For such a reason it was possible for Mott, in his History of American Magazines, to avoid a definition. Instead he could say that in the United States the terms journal, magazine, newspaper, periodical, etc., "are all more or less indistinct and confused in common usage, and the more so when one looks back over the last two hundred years. It would be pedantry to insist upon erecting . . . arbitrary distinctions which do not actually exist in u age, and it would be bad philology and bad history as well." ⁵ He is talking of American conditions when he says that format is the decisive characteristic of a newspaper, because in Great Britain, for example, book format was standard practice for all publications until the 1640s, when a distintcive format began to emerge for newspapers.

A sound definition of a serial and, for that matter, of a newspaper or periodical has long been sought, especially in book-trade, legal and library circles, as well as by bibliographers and literary historians. The futility of the quest can be seen from the attempts made by Du Prel, Kienningers, and Lehmann. The last named, for instance, is at pains to list nine characteristics of periodicals: association with an editorial office, collectiveness, continuity, mechanical reproduction, periodicity, popularization, publication program, timeliness, and universality. After thirty-six pages of elaboration, in the course of which he points out that libraries adopt a very wide interpretation of what a serial is,

Lehmann arrives at the following definition:

"A periodical is a printed work appearing regularly, founded with the expectation of unlimited duration, which is not predominantly concerned with events of the day, or else it pays attention only to the latest developments in a special field. Its issues are manifold both in their contents and in their layout, yet they present—the whole continuing series of them—an internal and external unity which is brought about by established editorial policy. For the most part periodicals serve limited fields, the extent of their audience is therefore varied. In their form they correspond to the needs of a circle of readers who are often widely scattered and who are accordingly only loosely connected with the place of publication." 10

A number of writers have pointed out that the connotation of the various terms applied to serial publications has changed from century to century. Kirchner, for instance, has defined a seventeenth- or eighteenth-century periodical, but his definition will not suffice for later times. Likewise, the close connection that exists between periodicals and the postal service has been brought out.12 That connection developed in the nineteenth and twentieth centuries; before that, periodicals tended to be sold issue by issue as though they were books, so much so that in 1716 it was suggested that the name "bookstore" be supplanted by "periodical store." 13

Contemporaneously in the United States a periodical-must satisfy the follow-

ing requirements if it is to qualify for second-class mailing privileges:

1. The newspaper or periodical must be regularly issued at stated intervals. as frequently as four times a year, bear a date of issue, and be numbered consecutively.

^aFrank L. Mott, A History of American Magazines (Cambridge: Harvard Univ. Pr., 1939), v. 1, p. 8-9.

^a Handover, Printing in London, p. 116.

^b Maximilian Du Prel. Der Zeitungsbeitrag im Urheberrecht unter besonderer Berücksichtigung der Unterscheidung zwischen Zeitung und Zeitschrift und die Autorrechte (Zeitung und Leben, no. 5 [Munich, 1931]).

^b Werner Kienningers, Die Einteilung der periodischen Presschriften (Straubing: Attenkofer, 1932).

^c Ernst H. Lehmann, Eintilhrung in die Zeitschriftenkunde (Teinzig: Biersemann, 1922).

ter, 1932). Ernst H. Lehmann, Einführung in die Zeitschriftenkunde (Leipzig: Hiersemann, 1936).

⁹ Ernst H. Lehmann, Einführung in die Zeitschriftenkunde (Leipzig: Hiersemann, 1936).

¹⁰ Lehmann. Einführung, p. 81.

¹¹ Joachim Kirchner. Die Grundlagen des deutschen Zeitschriftenwesens (Leipzig: Hiersemann, 1928), v. 1, p. 32–33. Kirchner's definition, as well as his seven characteristics for neriodicals as they were at the end of the eighteenth century can be found in David A. Kronick. A History of Scientific and Technical Periodicals; the Origins and Development of the Scientific and Technological Press, 1665–1790 (Metuchen, N.J.: Scarecrow, 1962), p. 29–32.

¹² Gerhard Menz. Die Zeitschrift, ihre Entwicklung und ihre Lebensbedingungen; eins wirtschaftsgezeinichtliche Studie (Stuttgart: Poeschel, 1928), p. 121 ff. At the time of the manuscript newsletters there was a different kind of connection between periodicals and the postmaster.

the postmaster.

13 Lehmann. Einführung, p. 4.

2. It must be issued from a known publication office.

3. It must be formed of printed sheets.

4. It must be originated and published for the dissemination of information of a public character, or it must be devoted to literature, the sciences, arts, or some special industry.

5. It must have a legitimate list of subscribers. 14

Legal definitions of a periodical or a serial stem from statutory law relating to second-class mail, which consists of newspapers and periodicals, or else from cases in court. The following, while it is not a good definition, is still good

law, coming as it does from the leading case:

" A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature or some branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature.¹⁵

A 1967 case, Fifield v. American Automobile Association, 16 hinged on whether the AAA Northwestern Tour Book, published annually, would be classed as a periodical. The court held that the publication was a book, not a periodical. Two cases were cited in which a work was ruled to be a periodical: in 1892 a weekly magazine of serial stories and in 1945 a monthly magazine of cartoons. In two other cases the work was ruled to be a book: the 1904 Houghton case, which involved a series of paper-covered items, consecutively numbered, each one of which contained a novel, short stories, or poems; and, in 1912, a weekly each issue of which contained a complete story. In the 1967 AAA case the test of "common understanding" was reaffirmed, in the Houghton case the Supreme Court had ruled that, in addition to having periodicity, a work must be a periodical in the ordinary meaning of the term. In the AAA case the court said it was advised that in library science six months is the upper limit for a periodical: that is, a publication issued twice a year or less is classed as a periodical or serial, whereas one issued annually or in single volumes is classed as a book. Actually the library ruling is that a periodical must generally be issued more frequently than annually.

In both the British and North American texts of the Anglo-American cataloging code a serial is defined as "a publication issued in successive parts bearing numerical or chronological designations and intended to be continued indefinitely. This statement, identical in the two texts, is followed by a sentence which is punctuated differently in the two editions, and the punctuation implies variant practices. The British text reads: "Serials include periodicals (e.g., newspapers, journals, and the memoirs, proceedings, transactions, etc., of wcieties), annuals (reports, yearbooks, etc.), and numbered monographic series. 17 The North American text reads: "Serials include periodicals, newspapers, annuals (reports, yearbooks, etc.), the journals, memoirs, proceedings, transactions, etc., of societies, and numbered monographic series. Similarly, the definition of a periodical is identical: "a serial appearing or intended to appear indefinitely at regular or stated intervals, generally more frequently than annually, each issue of which normally contains separate articles, stories, or other writings." The British text stops at that point, but the North American text goes on to say: "Newspapers disseminating general news, and the proceedings, papers, or other publications of corporate bodies primarily related to their meetings are not included in this term." 19

These definitions reflect much more the periodicals of the early 1900s than the extremely varied product of today, and their intention carries on the unsatisfactory separation of society publications from periodicals, more particularly in their subject cataloging. There are extremely important periodicals, notably

¹⁴ United States Code, Title 39. Section 4354.

¹⁸ Houghton v. Payne (1904) 194 U.S. 88, 24 S. Ct. 590, 48 L. Ed. 888, affirming (1903) 22 App. D.C. 234.

¹⁶ 262 F. Supp. 253 (1967).

¹⁷ Anglo-American Cataloguing Rules: British Text (London: The Library Assn., 1967).

p. 268.

15 Anglo-American Cataloging Rules: North American Text (Chicago: American Library Assn., 1967), p. 346.

19 Ibid., p. 345.

national bibliographies and statistical publications, as well as others, which

do not fit the Anglo-American cataloging code definition.

Ulrich's International Periodicals Directory has adopted another American Library Association definition which is more satisfactory: "A periodical is a serial publication which constitutes one issue in a continuous series under the same title, usually published at regular intervals over an indefinite period, individual issues in the series being numbered consecutively or each issue being dated." 20 The directory also includes United States government periodicals, which are usually listed in the February issue of United States Government Publications: Monthly Catalog. It also lists newspapers which do not appear more often than five days a week.

The inclusive term "serial" has established itself in American library usage. The word is in the title of major tools such as New Serial Titles and the Union List of Serials, and since 1942, when the Central Serial Record (now the Serial Record Division) of the Library of Congress was first mentioned, the Annual Report of the Librarian of Congress has made frequent and important reference to serial publications, whereas it paid scant attention to them earlier. European practice has generally inclined to "periodical" as the inclusive term. As evidence there is the British Union Catalogue of Periodicals (not "of Serials"), as well as the World List of Scientific Periodicals. Both Davinson 21 and Grenfell 22 elect to continue the British preference for "periodical" as against "serial." Grenfell says:

"The term 'serial' is becoming unpopular and a more comprehensive interpre-

tation is being given to the term "periodical." The latter term finds almost universal favour in other European countries, added to which it is one which is more easily interpreted by the layman. Whether a distinction is necessary is a highly debatable point and warrants the closest examination by those responsible for the various aspects of international standardization in library work."

Grenfell was writing before the adoption in 1967 of the word "serial" in the British text of the Anglo-American cataloging code. Added to that development is the position taken by the editor of the British Union Catalogue of Periodicals,

who says:

"As for the class of document I am mainly concerned with, it will he been noticed that I have referred principally to 'serial publications,' when 'periodical' is the word used in the name of the publication of which I am editor, as well as in BS 2509 (1959). 'Serial' is to become the preferred term with 'periodical' representing a sub-class of the term 'serial.' Although I do not propose to advance any definitions myself, I would point out that any definition for 'serial' will have to include publications appearing in a continuous, indefinite or 'openended' sequence under a common title and with some sort of sequence designation. 'Serial' will have to be distinguished from 'periodical' and 'series'; it will also need to specify a relationship to the term 'monograph,' since a 'monograph series' is a 'serial.' The term 'monograph' is often taken as being the opposite of the word 'serial,' and can be applied to single works whose nature can be described as 'polygraphic' in that they consist of papers, or sections, by different hands, such as a symposium or a manual. The word 'symposium' opens the way to other classes of document, serial or non-serial, monographic or polygraphic, which need precise definition, such as research and development reports, administrative reports, conference proceedings, etc." 24

The great advantage which the inclusive term "serial" enjoys is that it is not ambiguous, even though in some respects it may of necessity be vaque. "Periodical," on the other hand, is decidedly ambiguous, in addition to being somewhat vague; it may mean 'serial" in general, as it tends to in Europe, or it may, in Europe and elsewhere, mean "journal" or "magazine" in particular. Beyond this, in subject cataloging a periodical issued by a society was formerly distinguished from one issued by a nonsociety, particularly when it contained the transactions and other official notices of the organization. So there arose mutually exclusive subject headings such as Mathematics-Periodicals and Mathematics-Societies, a practice that persisted at the Library of Congress until 1971 (see chapter 13).

This definition is taken from Library Statistics, a Handbook of Concepts, Definitions, and Terminology (Chicago: American Library Assn., 1966), p. 139.

D. E. Davinson. The Periodicals Collection; Its Purpose and Uses in Libraries (London: Deutsch. 1969), p. 33-38.

David Grenfell. Periodicals and Serials; Their Treatment in Special Libraries (2d ed.; London: Aslib. 1965), p. 1, 183-88.

Joid., p. 188.

Porter, "Standards," p. 30-31.

It is clear that a truly precise series of definitions, if indeed they can ever be contrived, will entail a large amount of elaboration, in part because the essential characteristic of a serial-namely, its formation by periodical or serial numbering—is by no means always present. On the one hand, there is a whole category of publications known to librarians as unnumbered series; there are numbered series whose first or later volumes lack numbering; there is an increasing number of serials which are republished in simple monographic form; and there are serial publications, many of them pseudoserials, whose numerical or chronological arrangement is derived from the edition statement or from the date of publication as given in the imprint—even from the sales number, as in the case of some League of Nations and United Nations documents. On the other hand, there are the so-called author series (that is, successions of works by a single author but held together by a serial name and numbering), which most libraries do not regard as serials, and there are nonserials (for example, the Pauly-Wissowa Realencyclopädic der classischen Altertumswissenschaft) which have all the earmarks of serials: their volumes are numbered, they never seem to exhaust their subjects, they have a plurality of authors, and so on.

One other significant factor must be borne in mind. The most experienced serial librarians cannot always tell whether an item is a serial or a nonserial when it first appears. On occasion they counsel treatment as a monograph until such time as it may be necessary to reopen the case, i.e., on receipt of other issues; or a work, originally thought to be a serial publication, may have to be recataloged as a monograph because no further issues ever appeared. It is all very well to say that periodically and seriality are infallible signs of a serial; difficulties arise because the intent of the publisher is not always known or ascertainable. It is not at all an uncommon experience for a library to decide on the evidence of the first issue, or what may be taken possibly as the first issue, that a work is or is not a serial, only to reverse the decision when the publications' true character has at length been discerned. The editors of the Union List of Serials and New Serial Titles have frequently been confronted by titles which some libraries have treated as serials while others have taken them to be monographs, further evidence of the uncertainties which prevail through lack of an

exhaustive, authoritative definition.

On all counts, therefore, it seems wiser to adopt a working definition than to confuse both theory and practice with endless exceptions and borderline cases. In these respects librarians are like the bibliographers and historians who look for a definition of terms such as "newspaper" and "periodical" so they can tell whether a title should be included in their studies or not. The librarian needs definitions to enable him to channel publications as surely as he can along the special lines which have been laid down for monographs, newspapers, pe-

riodicals, and society publications.

It was customary once to try to make hard and fast distinctions, particularly among government publications, newspapers, periodicals, and society publications. Nowadays there is a tendency to operate with as much latitude as is possible. Bella E. Shachtman represented this trend when, in the National Agricultural Library, she interpreted the term "serial" broadly "to include any title issued in parts which is incomplete in the library collection, thus periodicals, annuals, biennials, and even incomplete works-in-parts are considered serials." The Enoch Prait Free Library, which formerly drew a rather interesting distinction between periodicals and serials, 20 has now eliminated the distinction and employs just the term "serials." Within its Processing Division it has a Serials Unit which is charged with the responsibility for checking in all serials, placing subscriptions and claiming missing issues, preparing serials for binding, and maintaining a shelf-list for bound volumes.

In keeping with the times, then, a serial can be defined for library purposes as any item which lends itself to serial treatment in a library; that is, to listing in its checking records, whether they are manual or computerized; to cataloging and classifying as a serial; and to shelving in the current-periodical room or among the bound volumes of serials in the bookstacks. It is not necessary for a publication to go through all these serial stages; the current checking records

^{2&}quot;Current Serial Records—An Experiment," College and Research Libraries 14:240 (1953). In an earlier article, "Simplification of Serial Records Work," Serial Slants 3:6 (1952), Miss Shachtman says simply: "Our definition of a serial is: Any title issued in parts, which is incomplete in the library collection."

2 For the former practice see footnote 25, p. 16-17 of the first edition of Serial Publications.

will suffice for most works in parts, or the current checking records and cataloging. In doubtful cases one's judgment, based on the insights gained through years of handling serial publications, is all that is needed to decide on serial or nonserial treatment of an item, pending the possible receipt of any future issues. That is, just like the law courts, libraries can operate successfully on the basis

of the "common understanding" of what a serial is.

In accepting as a serial any item to which a library chooses to apply serial techniques of one kind or another, three borderline types must be distinguished. They are continuations, provisional serials, and pseudoserials.

CONTINUATIONS

When a library acquires part of a nonserial set for which it places a continuation order, it commonly lists the title in a special acquisition record for follow-up purposes. This kind of set is generally referred to in library parlance as a "continuation." Many libraries do not class continuations as serials in any way, especially when there are only one or two volumes still to come; when the set will be completed in the very near future; or when the volume numbering is by no means complicated, for example, when volumes and parts are not involved.

At the Library of Congress in 1953, when the Serial Record Section was detached from the Order Division to become the Serial Record Division, the pendulum swung the other way, and an effort was made to eliminate entries which could not be considered true serials. The Order Division then placed orders for the monograph continuations on an "until-completion" rather than a "contin-

However, the advantages lie with incorporating continuations in the current serial records. A single follow-up system becomes possible, and there are considerable economies in having the successive issues marked with their call number and sent directly to the shelves instead of having them go through the more elaborate and costly open-entry procedures in the catalog department.

PROVISIONAL SERIALS

Allied to the continuation is a mixed type, with the base quite definitely a nonserial and the continuation equally definitely a serial. The Library of Congress author catalog in book form is a good example. The work began in 1942-46 as a 167-volume set. There have been several cumulative supplements to the main work, and one publisher has cumulated the main work and the supplements in a single alphabet. At the same time, since 1948 there has been an annual supplement based on monthly and quarterly cumulations. This part of the catalog is clearly serial in character, just as surely as the foundation set is nonserial. Without doubt, too, the entire publication should be cataloged as a unit under the latest title, The National Union Catalog. It should be cataloged as a single entity, and by skillful manipulation of the book numbers the whole should be arranged on the shelves as a continuous set. Issues and volumes which are duplicated in any of the cumulations should be discarded or transferred to a storage warehouse.

Provisional serials are increasing in number, especially in the case of library catalogs and of encyclopedias which issue annual supplements. Whenever a complex work of this kind is held together as a unit on the shelves, good service to staff and readers inevitably follows. When the work is held together, the argument is in favor of treating it by serial methods, which will naturally keep the set intact and make automatic provision for the disposition of superseded parts

and volumes.

PSEUDOSERIALS

A pseudoserial is a frequently reissued and revised publication which quite properly may be, and on first publication generally is, considered to be a monograph. After the work has been revised and issued several times, however, it may conveniently be regarded as a serial, whether the library keeps merely the latest issue or whether it keeps a back file as well. Commonly the serial numbering for pseudoserials must be taken from the edition statement or the date of publication.

The Guide to Reference Books (see figure 1) and Ulrich's International Periodicals Directory (see figure 2) are examples of potential pseudoserials which became actual serials in two different libraries. In terms of library economy it costs much less to make a single serial entry than to catalog the work afresh each time a new edition comes out or, in addition to that, to cancel the previous set of cards when the latest edition is the only one a library retains.

Latest = RR 1.6
Ref 600.4
Doc R 1.10
also Lamont Lib.

Earlier = KSF 544

Guide to reference books. Chicago, etc.
1902 [1st] and later editions
Published by the American Library Association
Title varies: 1st-3d ed, Guide to the study and use
of reference books; 4th ed., New guide to reference
books

Many other Harvard libraries also have sets
(See next card)

Guide to reference books. (Card 2)

First-second editions by Alice B. Kroeger, thirdsixth editions by Isadore G. Mudge, seventh, etc. editions by Constance M. Winchell



FIGURE 1.—Catalog entry for a pseudoserial in the Harvard College Library.

In volume 22 of the Catalog of Books Represented by Library of Congress Printed Cards there were no fewer than sixty-four separate catalog entries under Sir John Bernard Burke for editions of Burke's Pecrage, a file that was difficult to consult because of constant variations in the wording of the title. In volume 6 of the 1942–47 supplement, however, a serial entry under Burke's Genealogical and Heraldic Eistory of the Pecrage replaced the monographic entries. The ratio of sixty-four to one gives some idea of the savings in descriptive and subject cataloging which are possible when a potential pseudoserial is actually treated by serial methods. Readers and staff are helped, too; in the case of Burke's Pecrage it is no longer necessary to thumb through many cards to find the latest edition, regardless of the wording of the titles on the successive editions.

Ulrich's international periodicals directory ,1st,ed., (1932₁-New York, Bowker.

v. 26-29 cm.

Title varies: 1932-38, Periodicals directory. - 1943-62, Ulrich's

periodicals directory.

Vol. for 1943 called Inter-American ed., with title also in Spanish; 1947 called Post-war ed., including "A list of clandestine periodicals of World War 11, by Adrienne Florence Muzzy."

Reginning with the 11th, each edition issued in 2 vols. Founded and for 1932-47 edited by C. F. Uirich.

(Continued on next card) 32--16320 (70rG7y\$7)

Ulrich's international periodicals directory. (Card 2)

-Supplement, 1st-

1966-

New York, Bowker.

v. 28 cin. annual.

Z6941.P52

1. Periodicals—Direct. 2. World War, 1939-1945—Underground literature—Bibl. 1. Uirich, Carolyn Farquhar, 1881— ed. 11. Muzzy, Adrienne Florence, 1885— A list of claudestine periodicals of World War 11. Title: Periodicals directory. 17. Title: Ulrich's periodiculs directory.

Z6941.U5

011

32-16320

Library of Congress

170rGT)-871

Figure 2.—Catalog entry for a pseudoserial in the Library of Congress.

In volume 153 of the same catalog there are many examples under "U.S. Laws, statutes, etc." of laws on a particular subject which were issued and reissued constantly. Between 1919 and 1941, for instance, the pension laws were published and cataloged individually by the Library of Congress no fewer than thirteen times. In recent years, however, the Library has converted the records for many of these publications to serial form (see figure 3).

Note the gains to a library which follow from the serial handling of pseudo-

1. Serial follow-up methods are applicable once the title of a pseudo-serial is included in the current serial checking record.

U. S. Lairs, statutes, etc.

Laws relating to social security and unemployment compensation. 1958-

Washington, U. S. Govt. Print. Off.

v. 24 cm.

. Compiler: 1958-.

G. G. Udell.

1. Old age pensions—U. S. 2. Insurance, Unemployment—U. S. 1. Udell, Gilman G., comp. n. Title.



60-64640 rev

Library of Congress

1r65f11

FIGURE 3.—Library of Congress catalog entry for laws frequently issued and reissued.

2. When desired, particularly in special libraries, a simple program for the discarding of superseded issues can be established. For United States government publications the regulations of the Superintendent of Documents permit the discarding of any publication after a revised edition of it has been received by a depository library.

3. The number of titles which must be cataloged each year is reduced desirably. At the same time the latest edition should be on the shelves sooner than

when it must await individual cataloging.

4. Processing costs of various kinds are decreased, e.g., because there are fewer

cards to make and file and because the shelf-listing function is simplified.

5. Readers and staff can more readily locate entries in the catalog, both because the mass of cards under a heading such as Burke or "U.S. Laws, statutes, etc.," is somewhat reduced and because the filing of the entries is not affected by the vagaries of wording in the titles of the successive ditions.

6. In libraries which have closed stacks the latest edition, which is the one most commonly sought, can be called for in a simple way, just by writing the word "latest" in the space for volume or year. When the latest edition is shelved in the reference collection, the serial entry can bring this fact to the attention of the reader or staff member in a simpler and clearer way than can be achieved

with a series of cards.

In 1969 the Library of Congress had 4,621 pseudoserials listed in its Serial Record Division. There were 1,310 on its visible index and 3,917 in its Old Serial Record, some items being listed in both catalogs. While the Library of Congress is still converting frequently issued publications into serials, it is not including law materials because the K classification arranges these items by date, not by a common serial-type number; and less is being done with pseudoserials in the era of shared cataloging because of the feeling that other libraries prefer separate cards for all editions. Actually the Library has little in the way of established policy on pseudoserials; a decision is made on each title as it occurs.

Local custom and a readiness to take advantage of fave rable circumstances are more important than theoretical considerations in the determination of what shall be treated by serial methods in any given library. Hence serial practice may and does vary in some quite important respects from one institution to another. Obviously the desideratum in the treatment of serials, as in other library operations, is a large measure of agreement in principle together with great latitude

in practice. Reflections such as these are what make a liberal, working definition of a serial of greater value than a series of definitions each of which has loopholes.

BIBLIOGRAPHY

Davinson, D. E. The Periodicals Collection; Its Purpose and Uses in Libraries. London: Deutsch, 1969, p. 33-37.

Grenfell, David. "What Is a Periodical?—or Serial?" in his Periodicals and Serials: Their Treatment in Special Libraries, p. 183-88, 2d ed. London: Aslib, 1965.

Kronick, David A. "Definitions of the Periodical," in his A History of Scientific and Technical Periodicals; the Origins and Development of the Scientific and Technological Press, 1665-1790, p. 28-38, Metuchen, N.J.: Scarecrow, 1962.

MARCH 18, 1975.

To: Working Group Conference on Resolution of Copyright Issues.

From: Publisher Component of Working Group.
Subject: Flow Diagram Describing Points of Data Collection for Reporting Photocopy for Payment of Copyright Fees.

In accordance with the request of March 4, the attached four sheets describe in greater depth the proposed use of an extra first page for each article copied as the means for data collection for royalty payments.

Page 1 of the attached identifies all participants in the most complex inter-

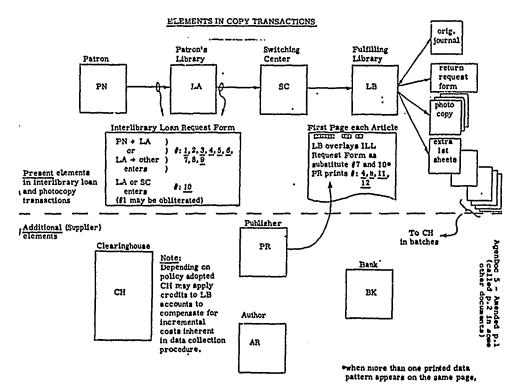
library loan systems now operating (e.g., NYSILL).

Page 2 identifies those data elements now utilized in a standard photocopy request and shows the additional data element required to implement the proposed collection method. Page 2 also identifies those participating organizations which might make further use of the data elements listed in contrast to those organizations requiring use of the data elements shown.

Page 3 identifies points in the flow where data is now collected to fill out the interlibrary loan request form and the single point additionally required to enter

data on the first page of the article copy.

Page 4 is a copy of the standard interlibrary loan request form used to initiate interlibrary photocopy requests and identifies the data elements listed on Page 2.



DATA ELEMENTS REQUIRED

Required or May be Used by: By Present (Library) Name of reader LA (only) 2. Type of user LA, LB, SC, CH, PR 3. Name of serial LA, LB, SC, CH, PR, AR Volume and Year 4. LA, LB, SC. CH, PR, AR Title and Author of Article 5. LA, LB, SC, CH, PR, AR 6. Pages inclusive LA, LB, SC. 7. Dates for transaction steps LA, LB, SC, CH CODEN or ISSN LA, LB, SC, CH, PR 9. Library A Identification LA, LB, SC, CH, PR 10. Library B Identification LA, LB, SC, CH, PR

plus

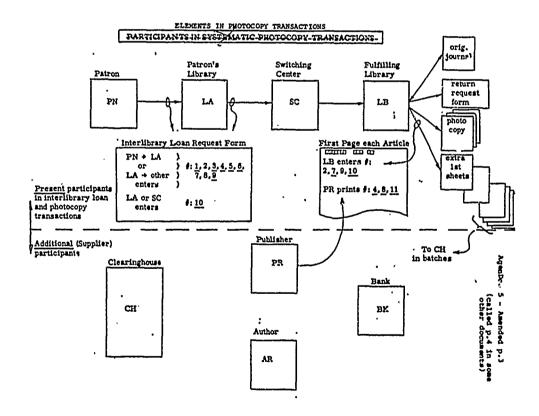
By Additional (Supplier)
Participants

11. Price per article

12. Inclusive dates for fee payment

.LA, LB, SC, CH, PR

AgenDoc 5 - Amended p.2



All the Park of annuals	INTERLIBRARY LOAN REQUEST According to the ALA, interflavory Lann Code REVORISS: Charted by SIDT SY. Lithout yorks Charted 5
For two of (1) Suina (2.) Dupt. Arthur (or periodent files, rol. and your) (1) (2) (3) (4)	RESTRICTIONS: For two in Energy only Copylog and portulated
Dide (with matter & progress for periodical articles) (final, edition, place & data) Title cadding only	NOT SENT BECAUSE: La use
Cisating I need developing places supply Mineralia Reed copy if sent does not assert I	Educated Cost de ICorella. Rend copy BORROWING LIBRARY RECORD: Date received. 7. Date received.
	Pr Library rate Princes Princes
From son, Let Main. The recurring Salemy comman resemblidity for configuration of narriconst. Main. The recurring Salemy comman resemblidity for configuration of narriconst. Title	Received to (set period of tournal)

Note: Data Element 8 is not included above (e.g. ISSN or Coden).

SPECIAL LIBRARIES ASSOCIATION, New York, N.Y., March 27, 1975.

To: Working Group Conference on Resolution of Copyright Issues. From: Committee to Compare Variable Pricing and Transaction or Usage Charges.

The Committee (J. K. Burgess, R. L. Kenyon, S. A. McCarthy and F. E. McKenna) met on Mar 24, 1975 at the American Chemical Society, Washington, D.C. (10:00 a.m.-4:00 p.m.).

This report is presented in 4 major sections:

A. Definitions

B. Caveat re Information Available

C. Variable Pricing Advantages Disadvantages

D. Transaction or Usage Charges Advantages

Disadvantages

A. Definitions:

1. Variable Pricing.—This should refer to any system under which separate prices may be established by the publisher for each serial or periodical for various classes of customer. The price set for a particular class of customer could be based on the subscriber's status or could relate to the usage of the material, such as for a library not carrying out photocopying activities, a library doing modest photocopying or a library doing a large amount of photocopying.

2. Transaction or Usage Charges .-- This should refer to any method by which royalties or payments are directly related to individual instances of photocopying or duplicating material by any means. Such royalties or payments will be according to a specified charge per unit. (These royalties or payments may vary from publication to publication and would be established by the publisher; the royalty charges established for the copying of a particular item or unit would be the same for all libraries.) The transaction or usage charges are independent of any subscription price charged by a publisher.

¹The definition of "serial" is being considered by another Committee; and the WG has not yet reached a consensus on the types of serials to be covered. This footnote applies to each use of the word, "serial," in this document.

B. Caveat re Information Available:

In order to place the advantages and disadvantages of both procedures above in better perspective, this Committee is aware of the absence of certain necessary information and the need for some study of the impact of both systems on the future operations of libraries, on the business of publishers, and on the dissemination of knowledge. The advantages and diladvantages as listed do not necessarily imply their relative importance.

C. Variable Pricing-Advantages:

(1) Libraries would know, in advance, their cost of serials 1 for budgeting purposes.

(2) If limited to a single varied price level; the varied subscription rate

could be collected/paid to a normal subscription agency.

(3) Libraries would not be called upon to do any additional work or record

keeping.

- (4) Libraries would not need to distinguish between types of material being photocopied—provided that *all* subscriptions placed by a library were at the price-level applicable to photocopying.
- (5) Would cost the least administratively for both publisher and libraries.
 (6) Publishers would receive revenue which they might otherwise not receive from unsupervised copying machines.

Variable Pricing—Disadvantages:

(1) Prices of subscriptions to libraries under a variable pricing policy would, by and large, undergo greater increases than they would under a transaction system.

(2) If multiple levels of pricing—according to photocopying usage anticipated or intended—were in effect, both publisher and library would be involved in some analysis (perhaps statistical sampling) of the amount of copying:

(a) The publisher so as to set appropriate rates; and

(b) The library so as to determine at what rate they would t for a subscription.

(3) If there were more than one level of pricing, subscriptions and payments

might not be handled by a subscription agency.

- (4) Even if only one additional or separate level were instituted (that is a normal rate for libraries or users without intended photocopying, and one rate for those with intended photocopying), this would in smaller or more specialized libraries make it necessary for the library photocopier to know for which periodicals the photocopying rate had been paid and for which it had not been paid, and cause additional work with regard to requests for photocopying of periodicals for which the higher rate had not been paid.
- (5) Cause additional work for both publisher and librarian if the publisher is to know the extent of photocopying either within a particular library or of a particular serial, assuming that such information be made available.

(6) Without statistical information make it impossible for publishers to

judge the financial success of a particular journal.

- (7) There is no necessary relation between the subscription price and the amount of photocopying. Therefore a single photocopying subscript... price causes libraries preparing few photocopies to subsidize those libraries proparing many photocopies. Some publishers may be undercompensated and other publishers may be overcompensated.
- (8) Payment would be required "in front," i.e. as payment when the subscription is started or renewed.

(9) Would eliminate applicability of "fair use."

- (10) The publisher may establish prices that are so high as to restrict usage of the material.
 - D. Transaction or Usage Charges-Advantages:

(1) Payment for photocopying usage would be directly related to the amount of copying done.

(2) Publishers would know exactly how financially successful certain serials or periodicals were.

(3) Small, occasional usage libraries would not subsidize the larger, big user type of library.

(4) The exact costs would be known to the library unit by unit.

(5) It is anticipated that a reduction in numbers of subscribers to a particular serial when offset by income from extended usage by photocopying would tend

The definition of "serial" is being considered by another Committee; and the WG has not yet reached a consensus on the types of serials to be covered. This footnote applies to each use of the word "serial" in this document.

to limit price increases; that only those serials with a reduction in total income (subscriptions and photocopying) would require price increases—other than those due to increased costs.

(6) This method would require no work on the part of subscription agencies or subscription departments of publishers.

(7) Since the charges for photocopying would be specified item by item, the costs incurred in this part of a library's budget could be determinable.

(8) It is possible that libraries could obtain other useful by products from any mechanism necessary for this method.

(9) Libraries would know for which serials 1 or periodicals photocopying privileges are available.

(10) Payment would not be required "in front," i.e. it would be charged after

(11) This method would lend itself to some reduction in unit charges to high usage libraries when a certain volume was reached.

Transaction or Usage Charges—Disadvantages

(1) Additional record-keeping would be required by libraries: minimally-so far as the publisher is concerned—the making of a second copy of the first page or other record to be sent to a clearing house. So far as the library's own requirements are concerned—depending on method of audit or record keeping a further copy or other record may be required internally.

(2) In large or complex library organizations, correct reporting, and verifica-

tion of payments, etc. will impose a burden on such libraries.

(3) The person making the copy would have to distinguish between royaltypayable and royalty-not-payable types of material.

(4) Problems will arise in regard to the making of copies of only sections

of an article; and the method of computing charges would require definition.

(5) The library would initially not be able to estimate its budgeting requirements.

(6) The clearing house or other authority would have to establish a library account number.

(7) There would be substantial administrative costs which would diminish the income to publishers unless offset by increased charges to libraries.

(8) The method requires clarification of "fair use" so as not to eliminate the concept of "fair use."

(9) The publisher may establish prices that are so high as to restrict usage of material.

> SPECIAL LIBRARIES ASSOCIATION, New York, April 1, 1975.

To: Working Group Conference on Resolution of Copyright Issues From: Committee to Consider Definition of Serials (Periodicals).

The Committee (J. Barsky, Mr. Harris, J. Marke and F. E. McKenna) met for the second time on March 31, 1975 at Special Libraries Association, New York (2:15-4:15 p.m.).

The first meeting of the committee had brought to light differences in usage regarding words such as "serials" and "periodicals" in the library community and in the publishing community. At the second meeting consideration focussed on finding a definition that already had been recognized in a national or international effort for standardizations—with such adjustments that would appear

to be appropriate for copyright discussions.

The American National Standards Institute (ANSI formerly USASI) had adopted and published American National Standard ANSI Z39.9-1971, "Identification Number for Serial Publications." This number is referred to as SSN (Standard Serial Number). Thru the cooperation of ANSI and ISO (International Organization for Standardization), the addition of a code for the country of publication converts the SSN to ISSN (International Standard Serials Number). The ISSN is a series parallel to the ISBN for books, For a more detailed discussion of the evolution, adoption and use of ISSN, there is attached as Appendix A a copy of p. xi-xiii (as well as p. vii) from Irregular Scrials & Annuals, 2d ed. Bowker, N.Y. 1972.

For additional background there is attached as Appendix B a copy of p. vii of Ulrich's International Periodicals Directory 15th ed., 1973-1974, Bowker, N.Y. 1973.

¹ The definition of "serial" is being considered by another Committee, and the WG has not yet reached a consensus on the types of serials to be covered. This footnote applies to each use of the word "serial" in this document.

A copy of ANSI Z39.9-1971 is attached to this report as Appendix C. Explanatory material is presented in the Foreword (p. 3 & 5). A footnote on p. 3 indicates that the definition of "serial" used is from Anglo-American Cataloging Rules, Chicago, ALA. 1967. p. 346.

The definition as presented on p.5 of ANSI 239.9-1971 is:

Serial. A publication issued in successive parts bearing numerical or chronological designations and intended to be continued indefinitely.

The above definition in the ANSI Standard is the first of two sentences in the

Anglo-American Cataloging Rules (p.346):

Scrial. A publication issued in successive parts bearing numerical or chronological designations and intended to be continued indefinitely. Serials include periodicals, newspapers, annuals (reports, yearbooks, etc.), the journals, memoirs, proceedings, transactions, etc., of societies, and numbered monographic series.

The committee considered the two statements above and agreed to modifications of the AAC definition by two subtractions and one addition. The committee presents to the Working Group the following:

Recommendation 1.—That the following definition of serial be accepted for use

in discussions of the Working Group:

Scrial. A publication issued in successive parts bearing numerical or chronological designations, which is intended to be continued indefinitely and which is identified by an ISSN. Serials include periodicals, newspapers, and the journals, memoirs, proceedings, transactions, etc. of societies. Serials are subject to subscription prices paid in advance. (This eliminates publications that appear annually or less frequently.)

Recommendation 2.—That the Working Group recommend the use of the above

definition to the Conference.

During the committee's discussions, it was recognized that whatever definition or variant is agreed on at this time, that of necessity the definition may have to be changed from time to time to reflect on going changes by both publishers and librarians, as well as to reflect experience gained from whatever initial steps are attempted.

APPENDIX A

INTERNATIONAL STANDARD SERIAL NUMBERING (ISSN)

Since publication of the first edition of Irregular Serials and Annuals in 1967, significant movements toward standardization have been implemented. These changes provide for more efficient compilation, storage, and dissemination of serials bibliographic data. Chief among these changes is the introduction of the International Standard Serial Numbers, which have been assigned to titles listed in the Bowker Serials Bibliography.

BACKGROUND

The Standard Serial Numbering (SSN) plan was prepared by Subcommittee 20 of the American National Standards Institute Committee Z39 on standardization in the f ld of library work, documentation, and related publishing practices. Committee Z39, organized under the procedures of the American National Standards Institute (ASNI), is sponsored by the Council of National Library Associations.

SSN AND ISSN

At the 1970 Oslo meeting, the International Organization for Standardization Technical Committee 46 (ISO/TC 46), Working Group No. 1, approved the present Z39 SSN as the basis for an international standard serial numbering (ISSN) The ISO/TC 46 plenary meeting in Lisbon, May 1971, approved this recommendation.

Following this meeting, ISO/TC 46 assigned a block of ISSN numbers to the United States; the R. R. Bowker Company's Serials Bibliography file was selected

as the starting point for the implementation of the ISSN.

The SSN was formally approved and published by ANSI as Identification Number for Serial Publications, (Z39.9-1971, \$2.25 per copy). The ISSN, though approved, has not yet been published by ISO/TC 46. However, for practical purposes, in order to avoid later changes in the format (this occurred when the SBN became the ISBN), and in order to conform to the content of the Bowker Serials Bibliography, which is international, the abbreviation used from the beginning will be ISSN.

DESCRIPTION OF THE STANDARD

The definition for "serial" used in the serial standard is from the Anglo-American cataloging rule: "A publication issued in successive parts bearing numbered or chronological designations and intended to be published indefintely."

The purpose of the standard is to define the structure of a concise, unique, and unambiguous code for serial publications. This code is solely for identification of serials. The assignment of the code numbers must be centrally administered. While International Standard Book Numbering is decentralized, a centralized system for serials numbering is required because of the large number of serials publishers throughout the world. Some 45,000 publishers are represented by the 70,000 publications now being numbered in the Bowker Serials Bibliography.

The registration number of the ISSN is seven numerical digits plus an eighth, the check digit. (See procedure for calculating check digits near end of article.) An example of an ISSN is 1234-5679. All digits must be printed. The hyphen is a

recognition aid.

A unique correspondence exists between each assigned ISSN and the serial to which it is assigned. For each serial there is only one code number and for each code number there is only one serial.

The central authority in charge of the ISSN assignment is responsible for interpreting the cataloging rules, definitions, and distinctions between serial entities involved in splits, mergers, title changes, and other problems.

ASSIGNMENT OF ISSN

In assigning the ISSNs, bibliographic centers and some libraries requested a purely sequential numbering; subscription agencies wanted assignment by blocks of numbers so they could identify titles by country. A solution was worked out in which every entry would be coded with a two-digit country code. The country code in use by the Library of Congress for MARC II is applied for this purpose. Every title has the country code printed before the ISSN, in the following format: US ISSN 00000019. The country code is not part of the standard. When the ISO approves an international country code standard, the country code will be modified accordingly.

PUBLICATION OF THE 188N

The first publication that includes ISSNs is the Bowker Serials Bibliography, which is published in three segments: Volumes I and II, entitled *Ulrich's International Periodicals Directory*, issued in a new 14th edition in 1971; and Volume III, entitled *Irregular Serials and Annuals: An International Directory*, published in its 2nd edition in 1972. Volume III contains a combined alphabetical index with ISSNs for every entry in Volumes I, II, and III.

Every effort has been made to include all serials that are subscribed to by major libraries and are currently abstracted and indexed. At the request of libraries, subscription agencies, abstracting and indexing services, and others using the ISSN system, the Bowker Serials Bibliography Department, in cooperation and coordination with the Library of Congress, ANSI Z30 (ISO), and ISDS, will assign numbers to titles not represented in its database. Listings of newly assigned ISSNs will be published periodically.

The ISSN for each publication listed in this database will be sent by computer mailing on a specially designed form to the publisher with the request that the

number be printed on the cover of each issue.

The New Serials Titles (NST) cumulative for 1950-1970, currently being developed, is the next large database to which ISSNs will be assigned. It is scheduled to be published in 1972. The NST cumulative file together with the Bowker Serials Bibliography file will represent the largest computerized database for serial users.

USES OF ISSN

ISSNs will do for serials what the International Standard Book Number (ISBN) is doing for books—that is, they will provide the serials publisher, the subscription agency, and the librarian with a tool for communicating basic information with a minimum of error. The advantages of such standardization are many. In the United States, the major subscription agencies handle approximately 85 percent of all periodical subscriptions and 60 percent of all irregular serials orders from libraries. By using ISSNs, no publication will be mistaken for another; the ISSN will aid in ordering, shipping, issue claiming, and billing.

Cataloging will be facilitated, and circulation and interlibrary loan systems can become more efficient. It will open the possibility of creating regional holding lists for improved interlibrary cooperation; and, since the Standard Numbering Agency at Bowker is involved in both book and serials numbering, the task of defining overlap of serials and monographs can be undertaken and resolved, providing the

librarian with concise bibliographic information.

Specifically, the ISSN can be used by abstracting and indexing services as a unique code and a means to bridge the gap between the ALA entry (as set forth in the Anglo-American cataloging rules) and the title as it appears on the piece and the title citation; by subscription agencies who will use it for communication, billing, inventory, claims, announcements, etc.; by authors for copyright; by publishers for inventory, ordering, billing, and announcements; and by users for location of the item in the library—linking the citation to the title. It will be used in library processing for identification (ID) countrol on acquisitions, claiming, binding, accessioning, shelving, monitor in process control, cooperative cataloging, circulation, inventory, updating holdings, developing local and regional holdings; in library reference for retrieval/request-identification, linkage-item with citation, interlibrary loan, etc. In machine use the ISSN will fulfill the need for file update and linkage, retrieval and transmittal of data.

CODEN CONVERSION TO ISSN

Before arriving at this ISSN code, Subcommittee 20 gave consideration to two alternate codes proposed, the Coden and the Ruly code, but they decided on ISSN. At the ISO Oslo meeting ISSN was again chosen in preference to the Coden code. Since serial titles are in all languages and alphabets, only a universally accepted set of symbols such as a numeric system with arabic numerals, common to all alphabets as well as to all computing machinery, could fulfill a serial standard code requirement. To solve the problem of converting the Coden to ISSN, there is a project under study to develop a translation table for the titles presently abstracted and indexed, indicating the corresponding ISSN for the presently used Coden.

INTERNATIONAL SERIALS DATA SYSTEM

At the ISO plenary meeting in Lisbon, May 1971, when the U.S./SSN standard was in the final stage of becoming an international standard, UNESCO/UNISIST requested and made a formal proposal to the ISO that they become the administering center for the ISSN, under the name of ISDS (International Serials Data System). This proposal was backed by financial commitments from UNESCO and the French government.

In October 1971 an agreement for cooperation and coordination had been reached among the International Serials Data System, the International Organization for Standardization, the Library of Congress, and the R. R. Bowker Company. The United States will go ahead with the implementation of the ISSN system with an international content until UNISIST/ISDS efforts to create ISDS materialize, and ISDS becomes capable of taking over and handling the task of

assigning ISSNs.

Years of hard work and effort are behind the ISSN accomplishment. Besides the members of ANSI Z39 Subcommittee 20, many people from the publishing and library and information science world have contributed at the national and international levels to the development of this standard. Special thanks must go to Dr. Jerrold Orne. Chairman of the ANSI Committee Z39, who chaired the ISO plenary meeting in Stockholm; Fred Croxton of the Library of Congress, Chairman of Subcommittee 20 for Standard Serial Numbering; Lawrence Livingston at the Council of Library Resources; Samuel Lazerow, Chief, Serials Division, Library of Congress; and Dr. Hans-Jurgen Ehlers of Germany, who chaired the work of the ISO/TC 46 Working Group No. 1 on ISSN.

PROCEDURE FOR CALCULATING CHECK DIGITS IN THE ISSN

The use of a check digit helps guard against errors resulting from improper data transcription. The check digit, which is calculated on a Modulus 11 basis as indicated in the example below, is particularly effective in detecting transposition errors.

1. Write the digits of the basic number.

2. Write the constant weighting factors associated with each position of the basic number.

8765432

3. Multiple each digit by its associated weighting factor.

8 14 18 20 20 18 14

4. Sum the products of the multiplications.

8+14+18+20+20+18+14=112

5. Divide the sum by the Modulus 11 to find the remainder.

 $112 \div 11 = 10$ plus a remainder of 2

6. Subtract the remainder from Modulus 11 to generate the required check digit. If the check digit is 10 generate a check digit of X.1 If there is no remainder. generate a check digit of zero.

11 - 2 = 9

7. Append the check digit to create the standard eight-digit ISSN.

ISSN 1 2 3 4-5 6 7 9

IMPLEMENTATION

It took more than three years from the beginning of the work of ANSI Z39 subcommittee 20 on serials until ISSN became an official standard. The value of a standard is realized only when it is implemented, and the publishing and library world fully understands it and uses it for the purpose for which it was designed. The established rules and principles of a standard must be strictly followed. Deviations, unimportant as they may seem in the publisher's or user's judgment, endanger the final success of the standard.

The work of those libraries seeking to adapt computer technology to control their serial operations shows that serial record management is a complex and difficult operation. Standardization offers a key to solving these difficulties. The first step toward standardization was taken with the approval of Inter-

national Standard Serial Numbering.

The second step has now been taken; it is this directory that begins the implementation of International Standard Serial Numbering.

(Reprinted in part from the Bowker Annual, 1972, "International Standard

Serial Numbering (ISSN)." by Emery Koltay.)

PREFACE

Irregular Scrials and Annuals: An International Directory is designed as a research tool to serve the library profession, to support the work of all libraries in supplying information to their users, and to provide a reference source for business and professional use in this country and abroad.

Serials and continuations such as proceedings, transactions, advances, progresses, reports, yearbooks, annual reviews, handbooks, and periodical supplements constitute a "twilight area" between books and periodicals. Our aim with the first edition of Irregular Scrials and Annuals was to begin shedding light on that twilight area. This second edition, covering some 20,000 such publications, goes a step further, including an International Standard Serial Number (ISSN) for every entry. This unique identification number provides a means for solving the various open problems related to serials in general and to the automation of serial control.

Irregular Serials and Annuals is a companion volume to Ulrich's International Periodicals Directory. It is international in its coverage, seeking to include material published in languages using the roman alphabet or having abstracts, subtitles, or some information in English. These two directories, both on magnetic tape, constitute the new "Bowker Serials Bibliography."

Limitations of inclusiveness in a directory of this kind are determined by its expected use. Our aim is maximum title coverage and a subject breakdown which will satisfy the widest range of use. Because of the great number of serial publications, we have established certain criteria for inclusion. While Ulrich's lists only those publications that are 'ssued more than once a year, this directory includes:

¹ Use of Modulus 11 can sometimes result in a check digit of 10. If this were used, the Standard Serial Number would not always be the required eight digits in length. Therefore, the X is used to represent the check digit 10, thus maintaining the uniform length of eight digits.

titles issued annually or less frequently than once a year, or irregularly serials published at least twice under the same title, and those first publications which plan to have subsequent numbered issues

current materials, whose last issue was published no earlier than January 1, 1963.

Excluded are:

national, state, and municipal documents, with the exception of selected serials which are generally regarded as part of the conventional literature of scientific, technical, or medical research

publications which are essentially administrative in content, such as membership directories, annual reports, house organs, or local interest publications.

The data given for each publication were gathered from the publishers or their representatives, from questionnaires, and from sample copies of serials received. Many valuable suggestions received from their sources have been incorporated into this edition; others will be used in future editions.

We wish to express our appreciation to the Bowker Company's management for its strong support and competent guidance, and for alloting resources for the extensive editorial work needed to create the serial data-base from which both this directory and *Ulrich's* are drawn.

Many thanks are due to managing editor Louise Valuck for her persistence and alertness in carrying out this complex work, to Despina Papazoglou, Robert Agajeenian, and Leigh Carole, assistant editors, and to the various outside contributors for their constructive and devoted interest. We acknowledge the work of managing editor Merle Rohinsky and her staff in assigning the country codes to the *Ulrich's* periodical titles in this director's combined index.

Our appreciation is also extended to the librarians of the Library of Congress, the National Library of Medicine, the New York Public Library, New York University, the United Nations, and of university, college, public, and special libraries throughout the country for their interest and support. We also appreciate the cooperation of the publishers and their representatives who contributed the necessary information for selecting and listing titles.

The editor and publisher of this volume welcome any suggestions for the improvement of future editions and updating services. We intend to publish new editions of this directory biennially, with quarterly supplements appearing between the editions. A supplement for serials, covering both *Ulrich's* and *Irrcgular Serials*, is planned for the end of 1972, while the quarterly updating service will begin in March 1973.

EMERY KOLTAY,
Director, Scrials Bibliography.

APPENDIX B

PREFACE

The 15th edition of Ulrich's International Periodicals Directory includes entries for approximately 55,000 in-print periodicals published throughout the world. Now in one volume, it updates and expands the base volumes of the 14th edition and includes as well those titles issued at regular intervals which were listed in the Bowker Scrials Bibliography Supplement 1972. New editions of Ulrich's and its supplements are published biennially, in L'ternating years.

the Bowker Scrials Bibliography Supplement 1972. New editions of Ulrich's and its supplements are published biennially, in L'ternating years.

For the first time, the assigned International Standard Serial Number (ISSN) with country code appears in the main entry. The ISSN is a concise, unique and unambiguous numerical code to identify serial publications. The ISSN system is the result of the cooperative efforts of the American National Standards Institute (ANSI) Standards Committee Z39 on Standardization in the Field of Library Work, Documentation, and Related Publishing Practices, and the International Organization for Standardization (ISO), which designated the Bowker Serials Bibliography database as the starting point for the implementation of the standard. The country codes, provided in these listings as an additional aid, are those used in the Library of Congress MARC II format.

The subject heading list has been expanded and revised to reflect new disciplines and to provide finer breakdowns for more direct access to specific subject areas. For the first time, Dewey Decimal Classification numbers (from the 17th edition of *Dewcy Decimal Classification and Relative Index* with some 18th edition modifications) are included with each entry to give additional subject information.

In addition to the main text, this directory contains a separate listing of some 1.800 periodicals that have ceased or suspended publication since the last edition, plus a separate title listing of periodicals that have appeared since 1971. Specific details on the organization of *Ulrich's* will be found in the "User's Guide" following this preface.

Ulrich's includes periodicals which are currently in print, issued more frequently than once a year, and usually published at regular intervals over an indefinite period of time. Annuals and irregular serials are covered in a companion volume entitled Irregular Serials and Annuals: An International Directory, 2nd edition (Bowker, New York, 1972) and the Bowker Serials Bibliography Supplement 1972.

All information concerning periodicals was obtained through direct inquiry to publishers or by personal examination of the publication itself. Entries included in the 14th edition which could not be updated in time for publication are listed with an asterisk following the title.

Although we have made every effort to provide accurate information, the R. R. Bowker Company has no legal responsibility for accidental omissions or errors in the listings. We invite you, the user, to submit comments and suggestions so that we may continue to provide you with the most accurate and up-to-date information.

We wish to express our sincere appreciation and thanks to the members of the editorial staff. Rochelle Katz, Diana Moon, Jacqueline Mullikin, Despina Papazoglou, Ruby Ruth, Raya Yachnin, Irving Klein, Fern Steinberg, and Myra Weinberger, and to the many librarians, publishers, and editors who have so generously contributed to the compilation of this edition. A special thanks to Mrs. Margaret T. Fischer, Manager of Bowker's Data Services Division, for her strong support, encouragement, and guidance.

MERLE ROHINSKY,

Managing Editor.

OCTOBER 1973.

APPENDIX C

AMERICAN NATIONAL STANDARD IDENTIFICATION NUMBER FOR SERIAL PUBLICATIONS

An American National Standard implies a consensus of those substantially concerned with its scope and provisions. An American National Standard is intended as a guide to aid the manufacturer, the consumer, and the general public. The existence of an American National Standard does not in any respect preclude anyone, whether he has approved the standard or not, from manufacturing, marketing, purchasing, or using products, processes, or procedures not conforming to the standard. American National Standards are subject to periodic review and users are cautioned to obtain the latest editions.

Caution Notice.—This American National Standard may be revised or withdrawn at any time. The procedures of the American National Standards Institute require that action be taken to reaffirm, revise, or withdraw this standard no later than five years from the date of publication. Purchasers of American National Standards may receive current information on all standards by calling or writing the American National Standards Institute.

FOREWORD

(This Foreword is not a Part of American National Standard Identification Number for Serial Publications, Z39.9-1971.)

This standard was prepared by Subcommittee 20 of American National Standards Committee on Standardization in the Field of Library Work, Documentation, and Related Publishing Practices, Z39. Committee Z39 is organized under the procedures of the American National Standards Institute and sponsored by the Council of National Library Associations.

The subcommittee was organized in May 1968 and charged with "the development of a standard registration code for periodical and serial publications."

The spectrum of available coding methods examined included: (1) structured codes which reflect characteristics of the individual serials; (2) derivative codes, which, while partially reflecting characteristics of the serial, are derived from the expression of one or more of the characteristics; and (3) registration codes which have only the property of unique identity.

Because the one consistent characteristic of the serial is change, and this applies to each of the descriptive elements of the series, a registration code for

serials has been selected.

A fundamental requirement for a registration system is central control of the registration process. In the case of serials an equally critical element is the de-

finition and description of the serial entities to be assigned numbers.

The Library of Congress has agreed to serve as the registration center subject to the availability of the necessary funds, manpower, and space. This responsibility includes interpreting the definition of a serial, distributing directories of serial number assignments, circulating data on revisions and correctons, making cross references between serial numbers, and encouraging the use of standard serial numbers.

Suggestions for improvement gained in the use of this standard will be welcome. They should be sent to the American National Standards Institute, 1430 Broadway, New York, N.Y. 10018.

AMERICAN NATIONAL STANDARD IDENTIFICATION NUMBER FOR SERIAL PUBLICATIONS

1. Purpose and scope

This standard defines the structure of a concise, unique, and unambiguous code for serial publications. The code is solely for the identification of serials. It recognizes that the assignment of the code numbers must be centrally administered.

2. Definitions

Serial. A publication issued in successive parts bearing numerical or chronological designations and intended to be continued indefinitely.

3. Code description

3.1 Format. The code is a registration number composed of seven decimal digits plus an eighth check digit. The check digit is calculated as outlined in the

Appendix.

The external representation, that is, the code, when used in publication, is formatted in two groups of four digits, the two groups being separated by a hyphen (XXXX-XXXX) wherein each X is a digit, all of which must be present. The hyphen is an aid to recognition. The eighth digit is the check digit.

3.2 Characteristics of the code

3.2.1 Uniqueness. A unique, one-to-one correspondence exists between each assigned code number and the serial to which it is assigned, so that for each code number there is onl. one serial and for each serial there is only one code number.

3.2.2 Permanency of Assignment. The relationship between code number and

serial, once established through assignment, is permanent.

3.2.3 Immutability of Format. The format of the code as specified will not change.

3.2.4 Conciseness. The code contains sufficient digits to achieve uniqueness and provide for error checking but is otherwise as short as possible.

3.2.5 Error Reduction and Detection. The code has two error reduction characteristics which aid in accuracy in use: an easily read format for error avoidance, and a check digit for error detection.

4. Application

4.1 Assignment. The assignment of code numbers will be administered by a central authority which will interpret cataloging rules and definitions as required. This includes working definitions of serials and the distinction between serial entities involved in splits, mergers, title changes, and other anomalies.

¹ Definition from Anglo-American Cataloging Rules. Chicago: American Library Association, 1967, glossary, pp. 343-347.

Prior to the assignment of a code number, the central authority will obtain evidence that a given publication is a serial.

4.2 Dissemination. The central authority will maintain a record of code num-

bers assigned.

The central authority will foster the broad availability of lists of code numbers.

The central authority will promote the use of the code by encouraging the publishers of directories and serials to incorporate the code numbers in any directories of serials and on the serials themselves.

PROCEDURE FOR CALCULATION OF THE CHECK DIGIT

The use of a check digit he ps guard against errors resulting from improper data transcription.

The check digit is particularly effective in detecting transposition errors.

The check digit used is calculated on a Modulus 11 basis as indicated in Table A1.

TABLE A1.—PROCEDURE FOR CALCULATION OF THE CHECK DIGIT

Procedure 1. Write the digits of the basic number 2. Write the constant weighting factors associated with each position of the basic number. 3. Multiply each digit by its associated weighting factor. 4. Sum the products of the multiplications. 5. Divide the sum by the modulus 11 to find the remainder.	Example							
 Divide the sum by the modulus 11 to find the remainder. Subtract the remainder from Modulus 11 to generate the required check digit. If the check digit is 10, generate a check digit of X.1 If there is no remainder, generate a check digit of zero. Append the check digit to create the standard 8-digit standard serial number (SSN). 	11-	-2=5	,	lus a	remai	inder	of 2	

¹ Use of Modulus 11 can sometimes result in a check digit of 10. If this were used, the standard serial number would not always be the required eight digits in length. Therefore, the X is used to represent the check digit 10, thus maintaining the uniform length of eight digits.

AMERICAN NATIONAL STANDARDS

The standard in this booklet is one of nearly 4,000 standards approved to date by the American National Standards Institute, formerly the USA Standards Institute.

The Standards Institute provides the machinery for creating voluntary standards. It serves to eliminate duplication of standards activities and to weld conflicting standards into single, nationally accepted standards under the designation "American National Standards."

Each standard represents general agreement among maker, seller, and user groups as to the best current practice with regard to some specific problem. Thus the completed standards cut across the whole fabric of production, distribution, and consumption of goods and services. American National Standards, by reason of Institute procedures, reflect a national consensus of manufacturers, consumers, and scientific, technical, and professional organizations, and governmental agencies. The completed standards are used widely by industry and commerce and often by municipal, state, and federal governments.

The Standards Institute, under whose auspices this work is being done, is the United States clearinghouse and coordinating body for standards activity on the national level. It is a federation of trade association, technical societies, professional groups, and consumer organizations. Some 1,000 companies are affiliated

with the Institute as company members.

The American National Standards Institute is the United States member of the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC), and the Pan American Standards Commission (COPANT). Through these channels American industry makes its position felt on the international level. American National Standards are on file in the libraries of the national standards bodies of more than 50 countries.

For a free list of all American National Standards, write:

AMERICAN NATIONAL STANDARDS INSTITUTE, INC., 1430 Broadway, New York, N.Y. 10018.

APRIL 8, 1975.

To: Working Group Conference on Resolution of Copyright Issues. From: Committee to Evaluate Criteria and Copy Transaction Mechanism.

The Committee (Joan Titley Adams, Andrea Albrecht, James Barsky, Paul Fasana, Efren Gonzalez, Erich Meyerhoff, Gordon Randall, David Waite a. d Paul G. Zurkowski) met on Monday, April 7, 1975 at Academic Press, 111 5th Ave. New

York City (2:00 p.m. to 5:00 p.m.).

The language of two documents, AgenDoc 3-WG-3/4/75, "Mechanisms and Criteria for Royalty Payments and/or Clearance and Licensing Procedures," and AgenDoc 5-WG 3/19/75, "Elements in Photocopy Transactions," was closely evaluated. As a final step the committee measured the details of the Flowcharts against the Criteria. The detailed comments on AgenDocs 3 & 5 are included in the Appendices to this report.

COMMITTAE REPORT

The Committee applied a critical test to both the Criteria and the Mechanism. The major points developed include:

Point 1.—Any mechanism must provide a method for the user to determine whether the contemplated copying falls within the inclusive dates of a stated fee period.

Point 2.—A system based exclusively on duplicate copies of the first page of the copied journal article in "hard copy" does not provide a royalty payment mechanism for copying accomplished in microfilm, telefax, video, etc.

Point 3.—It is recognized that there are costs to the library intrinsic to a royalty payment mechanism. If these costs can be clearly defined, it must be determined how the costs shall be borne.

Point 4.—The mechanism was evaluated for interlibrary copy transactions. No evaluation was made of either the criteria or the mechanism for other that interlibrary copy transactions.

The Committee concluded that the mechanism and the criteria offer a basis for further discussions.

PAUL G. ZURKOWSKI, Chairman.

APPENDIX A

Comments by Committee on Evaluation of Criteria in AgenDoc 3.

Criterion 1. No objection to machine readable input so long as eye-readable indicia are used to enable parties to know the facts of a transaction.

Criterion 2. O.K., no committee comments.

Criterion 3. Procedure of mechanism must be readily understood by all including the lowest level clerical personnel. Mechanism for dealing the making of copy of part of an article still is unresolved.

Suggested language change: Change "any one article" to read "each article."

Criterion 4. (a) O.K., no committee comments.

(b) Publisher should not print notice requiring royalty where it is not so

entitled. (i.e. if an article is in public domain.)

(c) Definition of inclusive period needs further work (see Committee Point 1). It was noted that copyright constitutes a bundle of rights and that establishing a specified fee period for single copy copying does not mean publisher gives up other rights in copyright.

(d) The price per page question was discussed in the context of copying less than the whole article. The Committee felt simplicity in the system required payment of the "per article" fee over the complexities that would be introduced to cover partial article copying.

(e) O.K., no committee comments. (f) Was considered to be too general and that words such as "costly or complex" were indefinite and would stand in the way of attaining agreement. Committee recommended its Point 3 be incorporated in lieu of 4f.

(g) O.K., no committee comments.

Criterion 5. O.K. The clear implication of this criterion is that any materials which do not contain the prescribed indicia would, after the legislated beginning date, be exempt from payment of single copy copying royalties.

APPENDIX B

Comments by Committee on Evaluation of Flow Charts in AgenDoc 5.

I. The title of the Flow Charts at p. 2 & 4 and elsewhere should read: "Elements in Photocopy Transactions."

II. At p. 3, data elements 7 and 10 can best be accomplished by LB by one of

the following means:

A. A. date stamp applied to each duplicate copy of the first page. The stamp should incorporate LB's identification. In this way each document contains all

the necessary data elements.

B. An overlay of the ILL or copy request form which would provide data elements 7 and 10 as well as others. This was the publishers' preferred method. but it would be expected that data element 1 would, in many cases, be obliterated so as to protect the privacy of the user. This method would assure that each documents contains reference to data elements 7 & 10.

C. As earlier considered by the Working Group, a cover sheet for each copying period might be included with the first pages being sent to the clearinghouse. The committee felt this would frustrate accurate accounting at the clearinghouse since the first pages, if once separated from the cover sheet, could not be

assigned accurately to the appropriate source library.

III. An additional data element 12 providing the "inclusive date" for fee payment (see committee Point 1). This, like data elements 4, 8 and 11, would be preprinted on the first page of each article by the publisher. Thus, the mechanism is understood to call for the publisher to preprint data elements 4, 8, 11 and 12 on the first page of each article to signify its participation in the mechanism.

IV. If more than one article appears or begins on a single page, LB would indicate (as part of data element 10) which of the multiple printed prices pertains.

V. On page 3, after data element 9 underline LB and after data element 10 underline LA. For newly added data element 12 (inclusive fee date) under LA, LB, SC, CH and list but do not underline PR.

> AMERICAN LIBRARY ASSOCIATION. Chicago, Ill., April 10, 1975.

MEMORANDUM

To: Working Group Conference on Resolution of Copyright Issues.

From: Robert Wedgeworth, ALA

Subject: Recommendations to the Conference on April 24.

The preceding discussions focused upon the development of a mechanism which could conceivably be applied to account for photocopying activities in lieu of interlibrary loan offer us an excellent opportunity to make significant progress

toward a possible resolution of the copyright issues.

In order to build upon the work of those who developed the details of the mechanism, I would like to propose that, in addition to reporting to our parent group the progress we have made, we also announce that we are commencing a three month test program to come up with some hard statistics with which to evaluate the administrative feasibility of the mechanism. These data will also give us the opportunity to evaluate the mechanism in terms of what is actually being done in libraries.

The test data will be gathered from several representative communities of libraries located in Standard Metropolitan Statistical Areas in different parts of the country. All libraries in the area will be included with the exception of school libraries. This exception is consistent with the ALA Interlibrary Loan

Code.

All 263 SMSA's will be analyzed with respect to library holdings. We expect that the distribution according to size will create four groups from which we will choose one area from each group for the test. An alternative approach would be to analyze the SMSA's according to population. However, a preliminary analysis shows that there is little relationship between library holdings and population because of the anomalies caused by large universities being

located in small towns, etc. A basic assumption is that the larger the holdings of an SMSA, the larger will be the number of journal interlibrary loans.

1. The specific libraries included in the test will be instructed in the data

gathering procedures.
2. The libraries will provide information on all interlibrary loan requests for journal articles which they fill for other libraries.

3. These data will be analyzed with respect to the frequency and rankings

by specific journal and specific publisher within each SMSA.

4. The geographic patterns of borrowing and lending among the libraries will be analyzed.

I strongly urge that these test data be gathered at the earliest opportunity. Toward this end we should recommend that the National Commission on Libraries and Information Science assume the responsibility for sponsoring this program.

Recommendation by Working Group: That the Conference recommend to NCLIS that NCLIS assume the responsibility for financing and co-sponsoring with the Conference a study such as suggested in AgenDoc 9 with an understanding that such a study would include some testing of a payment mechanism.

APPENDIX 4

MISCELLANEOUS COMMUNICATIONS

This appendix 4 is composed of miscellaneous communications.

House of Representatives, Washington, D.C., September 8, 1975.

Hou. Robert W. Kastenmeier,

Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Rayburn House Office Building, Washington, D.C.

DEAR BOB: It has recently been brought to my attention by Fritz Henle, Photographer, that your Subcommittee on Courts, Civil Liberties and the Administration of Justice is currently considering H.R. 2223, a general revision of the Copyright Law.

In the enclosed correspondence from Mr. Henle, he indicates that certain revisions, specifically the institutional reproduction section, would be detrimental

to his rights as a creator of fine photographs.

I would appreciate your consideration of this particular section when the mark-up session begins. Apparently, there is a language problem which is creating quite a controversy.

With kind personal regards, I am

Sincerely,

RON DE LUGO, Member of Congress.

Enclosures.

St. Croix, U.S. Virgin Islands, August 29, 1975.

Hon. Ron De Lugo, Longworth House Office Building, Washington, D.C.

DEAR RON: Enclosed is a very distressing letter from my former publishers. I am now with Photo Editors who have just published my book about Pablo Casals, which is already a tremendous success and will make its debut in Washington most officially in February.

I hate to bother you with this long epistle but in order to understand our dilembia, you have to have the whole story. Also you are the only one whose fights

I respect and who has been immensely successful for our islands.

I am alone, but nevertheless I join the crowd of creative photographers in the states. Please give this dangerous situation your thought. Imagine for instance, my most recent work "Pablo Casals" would be unprotected by copyright! Enclosed

also some proof of my latest efforts.

I have also been on NBC for a half hour with the Virgin Islands photographs as a fitting background to the interview. This was in New Orleans. Then Channel 2 in San Juan repeated a similar effort always with my accent on the Virgin Islands. My latest effort will be quite visible soon in many magazines showing the Governor at Caneel Bay. This is a consigned ad of photography and an

extensive caption.

My activities are many and include the beautiful creative painting which my daughter is doing. About this I will write to you at a later date. I would greatly appreciate your interest regarding the letter from Viking Press to me and would you send me a copy of your letter expressing your opinion of the matter that photographers have to be protected as far as the ownership of their work is concerned. I am certain that you are fully aware to whom this letter has to be sent. Thank you for all you can do in this important matter. I shall be most grateful to you if you can be instrumental in bringing this to a satisfactory conclusion. With all good wishes,

Cordially yours,

FRITZ HENLE, Member of the ASMP.

THE VIKING PRESS INC • PUBLISHERS, New York, N.Y., July 31, 1975.

DEAR FRIEND: As your publishers, we at Viking feel you should be informed about a situation with respect to copyright that seriously affects each of us, and we are asking for your assistance in what promises to be a difficult legislative

struggle.

Although the Congress has considered revision of the Copyright Law for the past ten years without taking final action, everything now seems to point to a resolution in either this session of Congress or the next, the results of which will be with us for a long time. (The present Copyright Law dates to 1909.) A sound Copyright Law as the foundation of independent writing and publishing; it is essential to your livelihood and to ours.

The entire librar, community and much of the educational community are, through their various professional associations, seeking sweeping exemptions from copyright. Libraries want no effective curbs on systematic photocopying, and educators seek a total exemption for copying done for "non-profit educators".

tional purposes."

We had hoped that these institutions would adopt a more moderate stance but found otherwise when a House Judiciary subcommittee began hearings last month. One of the Congressmen on that committee reported that he had received almost 400 letters from libraries and educators supporting their position, even as the hearings were just getting under way, and that his colleagues could report similar experience. The members are receiving little or no mail from authors or anyone else on the other side of the issue.

We are not against the use of copying equipment to broaden access to knowledge. We do believe that systematic copying and distribution by institutions is against the best interests of writers, publishers, and, in the long run, readers. The elimination of all curbs on institutional copying will seriously affect your

rights as authors.

The Association of American Publishers, the Authors League, and other organizations are doing everything they can. But it is vital that Congress hear from you. Enclosed is a list of members of the House Judiciary subcommittee conducting the hearings, as well as a list of members of the full Judiciary Committee, to whom they will report. I urge you to write the members of the subcommittee immediately, and send a copy of the letter to your own Congressman and your Senators, and a copy, if possible, to me. I'm sure you realize the importance of your action.

Sincerely yours,

THOMAS H. GUINZBURG,

President.

LAW OFFICES OF WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER, Washington, D.C., October 1, 1975.

Hon. Herbert Fuchs, Counsel, House Committee on the Judiciary, Washington, D.C.

DEAR HEBB: Enclosed for your consideration is the proposed amendment to H.R. 2223 to place jukebox royalty rates under review and adjustment authority of the Copyright Royalty Tribunal.

For the purpose of the amendment, a brief explanation is appended. You will note that the explanation assumes that the full Senate Judiciary Committee will approve action earlier taken by the Senate Copyright Subcommittee which reinstated this jurisdiction in the Tribunal.

If there is further information you may require, please call upon me. Sincerely,

BENJAMIN L. ZELENKO.

Enclosure.

AMENDMENT TO H.R. 2223 (COPYRIGHT REVISION) TO PLACE JUKEBOX ROYALTY RATES UNDER REVIEW AND ADJUSTMENT BY THE COPYRIGHT ROYALTY TRIBUNAL

Amend H.R. 2223 as follows:

On page 58 line 33 and on page 59, line 14, delete the phrase "and 115" and insert in lieu thereof, ", 115 and 116".

Explanation: The purpose of the amenament is to confer authority on the Copyright Royalty Tribunal to review and adjust jukebox regalty rates periodically. The bill as drafted authorizes the Tribunal to undertake such review and adjustment of rates with respect to cable television systems (sec. 111) and mechanical royalties for phono-records (sec. 115). The amendment reflects the action taken by the Senate Copyright Subcommittee and by the Senate Judiciary Committee.

LAW OFFICES OF

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER, Washington, D.C., November 6, 1975.

Hon. HERBERT FUCHS, Counsel, Committee on the Judiciary, Washington, D.C.

DEAR HERB: Enclosed for your information is a copy of a letter Lated November 3 to the Register of Copyrights from Bernard Korman of ASCAP. The letter concerns a question put to the Register by Chairman Kastenmeier asking whether there was ever a "double payment" as a result of ASCAP licensing. Sincerely,

BENJAMIN L. ZELENKO.

Enclosure.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, .

New York, N.Y., November 3, 1975.

Hon. Barbara A. Ringer,
Register of Copyrights, Copyright Office, Library of Congress, Washington, D.C.
Dear Ms. Ringer: I write to confirm our telephone conversation this morning in which you advised me of the question put to you by Chairman Kastenmeier

as to whether there is ever a double payment as a result of ASCAP licensing both the owner of a ballroom or similar establishment and the musicians who perform at such a place.

There is no er a double payment because ASCAP does not license musicians who perform at ballrooms, restaurants, night clubs or similar establishments.

As I mentioned to you I have written to Chairman Kastenmeier twice concerning the ballroom amendment and prefer not to burden the committee with another letter. Instead, I would appreciate it if you could supplement your testimony by reference to this letter.

So that you may have the full background, I am enclosing copies of my letters

to Chairman Kastenmeier dated August 6, and October 30, 1975.

Sincerely,

BERNARD KORMAN.

Advertising Typographers Association of America. Inc., New York City, N.Y., July 22, 1975.

Hon. Robert Kastenmeier,

Chairman, Subcommittee on Courts, Civil Liberties and Administration of Justice of the House Judiciary Committee, House of Representatives, Washington,

DEAR MR. CHAIRMAN: I did not have an opportunity at the July 17th hearing on the above bill to respond to your question as to whether all of the "opponent" witnesses on copyright for type face designs were satisfied with the bill as

Our position is as follows:

(1) We are satisfied with the provisions of Title I as written because of our belief that these provisions continue existing law which does not protect type face designs.

(2) We do not favor any expansion of the coverage of Title II because of our belief that such coverage presently extends only to relatively few truly unusual designs for type face and that such coverage is all that should be afforded.

(3) We do however, see two amendments to Title II.

(a) A compulsory universal licensing provision with reasonable rates—
the need for which has been conceded by the proponents of protection, and
(b) Amendment of Section 220(a) of Title II to eliminate the possibility

of a suit for infringement in the absence of actual certificate of registration. I trust that the foregoing answers your questions but I would be happy to elaborate or answer any further questions which the Subcommittee may have. Sincerely,

WALTER A. DEW, Jr.

THE AUTHORS LEAGUE OF AMERICA, INC., New York, N.Y., September 30, 1975.

Hon. Robert W. Kastenmeier, House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: Last Friday, the U.S. Court of Appeals decided an important issue of copyright law in Bartok v. Boosey & Hawkes, Inc. et al. We will send you a copy of the opinion within the next few days. But because the opinion and decision are relevant to the pending Revision Bill, we thought it would be advisable to discuss them briefly.

At issue was the meaning of the term "posthumous work" as used in Sec. 24 of the present Copyright Act, which is repeated verbatim in Sec. 304 of the Revision Bill. These sections prescribe the persons entitled to secure renewal copyright. Ordinarily, if an author dies before the renewal year, the surviving spouse and children are granted the right to renew. In the case of a "posthumous work", renewal copyright is secured by the proprietor of the original copyright. The clear-cut purpose of the renewal clause to give the author's widow, widower and children the benefit of his or her work during the renewal term.

Bela Bartok's Concerto for Orchestra was completed during his lifetime and he assigned the copyright to the publishing firm of Boosey & Hawkes. He did not survive until the renewal years. Had Boosey & Hawkes distributed printed copies to the public before Bartok's death, there could be no question that his widow and children were entitled to renew. But although the Concerto was performed during Bartok's lifetime in Carnegie Hall and Boston's Symphony Hall and broadcast, printed copies were not disseminated by the publisher until a few months after Bartok's death.

Although a "posthumous work" is not defined in the Act, the District Court Judge ruled that the test was "publication" after the author's death—conceding that this defeated the purpose of the renewal clause. He therefore concluded that the publisher, rather than Bartok's widow and children was entitled to the renewal copyright. The Authors League filed a brief amicus curiae on appeal.

In its brief, the League argued that within the context of the renewal clause, a work could only be deemed "posthumous" if the rights to copyright or exploit it were not granted by the author during his lifetime. And this was also one of the roints argued by the Appellant. The majority of the Court of Appeals so decided, "The only definition of 'posthumous' which fulfills the legislative purpose of protecting authors and their families is that in the narrow situation—not present here—where a contract for copyright was never executed by the author during his life."

Le Court of Appeals reversed the District Court decision, and ruled that the

iow and children were entitled to secure the renewal.

The Court also ruled that where publishers had secured renewal copyrights in such circumstances, they were held in trust for the widow, widower and children.

Needless to say, The Authors League believes that the majority opinion is correct, and we respectfully urge that the Subcommittee, in its report on the Revision Bill, indicate that the Court of Appeals construction is accepted by Congress and applies to Sec. 304 of the Revision Bill.

Sincerely yours,

IRWIN KARP, Counsel.

RECORD INDUSTRY ASSOCIATION OF AMERICA, Los Angeles, Calif., September 19, 1975.

Hon. George Danielson, House of Representatives, Washington, D.C.

DEAR MR. DANIELSON: During the recent Subcommittee testimony on mechanical royalties, you questioned Leonard Feist of the Music Publishers' Association as to whether mechanical royalties above 2¢ are ever paid. Mr. Feist stated that royalties in excess of 2¢ are paid only by agreement between publishers and recording companies on long classical works at the rate of ½¢ per minute.

Mr. Feist's statement to you was not complete and was not a full reflection of prevailing practice. In addition to classical works, popular recordings, by general agreement among publishers and recording companies, also enjoy an "overtime" rate whereby mechanical royalties and recordings in excess of 5 minutes are paid at the rate of $\frac{1}{2}$ ¢ per minute. Therefore, a recording that is just over 5 minutes long would pay $2\frac{1}{2}$ ¢, a recording that is just over 6 minutes long would pay 3¢, etc.

In our own industry's research on the mechanical question, I personally supervised the examination of the Top 150 best selling albums in a given week. Out of 1664 total tunes represented within those 150 albums, I found that 2.7 tunes (12.4%) were in excess of 5 minutes in length, and thus were qualified for a mechanical royalty in excess of 2¢. A recent Cambridge Research Institute study showed that mechanical royalty rates over 2¢ are paid on 5.4% of regular-priced records because of overtime rate practices.

I hope this clarifies the inaccuracies in Mr. Feist's response to your question.

* Respectfully,

STANLEY M. GORTIKOV.

MLTHEMATICAL REVIEWS, UNIVERSITY OF MICHIGAN, Ann Arbor, Mich., October 23, 1975.

Hon. Robert W. Kastenmeier, Head—Committee on Copyright Laws, Rayburn House Office Building, Washington, D.C.

DEAR SIR: A recent article in the U.S. News & World Report (October 6, 1975) called to my attention the reevaluation in Congress of the structure of our copyright laws, and I understand your committee is about to take some action.

I hope it is not too late for you to consider, or if you already have then to add to your consideration, my concern for the exploitation of a form of creation which apparently is completely unprotected. This is the creation of the chess player

in the form of the chess games he plays and annotates.

This concern has been as old as chess itself, over 100 years in the form I am speaking of, but the exploitation is particularly visible and blatant today—with the rise of our own champion, Bobby Fischer, to the world chess throne, held by the Russians since 1948. His magnetic play and the romantic aspects of an individual genius (Nobel Prize Laureate Eccles, for his brain research, exclaims: "... you have a Mozart or Mendelsohn or a Keats with their marvelous youthful creativity; and in our own days Bobby Fischer at 6 discovered that he had been born with the brain of a chess genius!") successfully challenging the whole school of Russian chess, elevated the scale or renumeration in chess activities from thousands to millions of dollars.

But its greatest champion has also been its greatest victim—in many ways. With respect to the subject I am writing about, we find numerous books with Fischer's name on the cover and his games between covers, little or nothing else, for which he gets nothing. Yet obviously only his name is what sells them, and

his activities.

There are books with literally nothing but the scores of his games in them. Others have light comments and analysis from newspapers or chess magazines, where there is likewise no protection from the exploitation of the professional chess player. And it is only one step from newspapers and chess magazines to books.

The relevance of this to the work of your committee should be obvious, al-

though what to do about the exploitation may not be.

Because chess, at the level I am speaking of, is not widely understood I have appended a long postscript describing what goes into the production of a chess game and how it enters into the public domain and is used there. Also I have tried to draw the parallel between chess and the arts, sciences, and sports—three areas in which such exploitation has been fought with some success. The parallel may suggest ways to fight it in chess.

I imagine it is premature to go into detail here about the form in which copyright protection may be extended to chess, so I will only add that I have given the matter considerable thought and find no serious problems that do not have parallels in the arts and sciences, where they have been tackled with considerable success. I would be glad to testify in front of your committee to elaborate

on this.

I expect to carry my case to the chess public through the offices of the United States Chess Federation. The editor of its main publication, Chess Life and Review. one of the leading chess magazines with a world wide subscription of 70,000, is sympathetic to the cause and supports my going to the policy board ruling over him, and petitioning that the magazine extend on its own volition at least token payment for any use of a chess game. It would set a precedent, and add dignity to the profession by allowing the artist to feel he owns his own creation.

I also expect to use my academic offices to further the cause, and have prepared several articles dealing with chess in general, and the world championship in particular (I too once was a professional chess player, and am still one of the top ranked players in America). They will appear in various professional journals. In particular two very long articles will appear in the November and December issues of Chess Life and Review.

Not everything I write will deal with the copyright laws per se, but much of it will concern the plight of the professional chess player in America—with lack of copyright protection being a contributing factor.

I hope that you can give this a serious consideration.

Respectfully yours,

CHARLES I. KALME,
Associate Editor.

Enclosure.

PRODUCTION OF THE CHESS GAME

At top level play, a chess game is a product of many years of study and practice to attain general proficiency, plus specific preparation for the event in which the game is played.

The general preparation usually begins in the early teens, and the top players usually become quite proficient by the early twenties. By the early thirties they are close to their peak (Bobby Fischer is 32!), but they continue their develop-

ment into the early forties and are still going strong by the early fifties. After

that teaching and writing replaces active play.

Preparation for each specific event can be extensive, with 6 months to 1 year of specialized training not being unusual for a world championship match. It consists of opening analysis and choice of style directed at a specific opponent or opponents, among other things.

In this sense the game of chess is more a science than a sport, although the visible execution of the game is also a mixture of an artistic and athletic per-

formance—more artistic than athletic.

CHESS IN THE PUBLIC DOMAIN

A chess player's work can enter the public domain in two ways: his own play, as viewed by spectators on TV or other medium, including immediate presence; and publication in newspapers, magazines, and books. In publication, one should distinguish between the player's own analysis of his games, and other people collecting and analyzing them.

The use of the game by others also can thus be two-fold: spectator enjoyment; and playing as well as analyzing the published games later. In use of published games later, one should distinguish between playing and analyzing for aesthetic pleasure, and doing it to gain scientific knowledge to be applied in tournaments,

perhaps against the creator of the game himself.

A point not fully appreciated, and most relevant when speaking of copyright protection, is that by far the greatest consumption of chess games comes from publications, not from immediate performance. I follow the game very closely and have played over all the games of Bobby Fischer and the great champions—and almost all from books. Even when 1 watch a tournament, I will buy books or magazines describing them, because the games require more thought to appreciate than one can apply at the time of performance.

This makes it paramount that the creator own his creation, as far as publication in newspapers, magazines and books goes, for given that this is where the real consumption takes place this is also where the profits lie. Tournament prizes and appearance fees are a mere pittance. Fischer can command big fees because of his uniqueness, but the state of professional chess is deplorable for others. The U.S. open championship offers \$2000 for 2 weeks hard work, if you win! If not you get next to nothing, and there are over a hundred contestants! Given that an active player is not apt to divulge his analysis, for fear of it

Given that an active player is not apt to divulge his analysis, for fear of it being used against him in tournaments, the exploitation is complete. Others make far more from his efforts than he does, since they can publish his games

at will with no recompense to him.

Some form of copyright protection would go a long way toward correcting this injustice and add dignity to the game of chess!

NOVEMBER 2, 1975.

Hon. Robert W. Kastenmeier, Head—Committee on Copyright Laws, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I agree with the thrust of Mr. Kalme's letter. I feel quite strongly and have so for many years, that chessplayers should have copyright protection for their chessgames. I, too, would be glad to go to Washington, D.C. to give my testimony on this subject before the appropriate committee of congressmen and/or senators who are drawing up the new copyright laws.

Sincerely.

BOBBY FISCHER.

P.S. You can contact me on this subject through Mr. Kalme.

Public Broadcasting Service. Washington, D.C., October 28, 1975.

Hon. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I am enclosing, for your consideration and assistance in the House Copyright Revision proceedings, a "Memorandum on

the Status of Public Broadcasting and Copyright Law" dated October 15, 1975, prepared for the Public Broadcasting Service and other public broadcasting organizations. As you will see, the memorandum outlines in some detail how public broadcasting is legally exempt from clearance and payment obligations under the present Copyright Law.

We will be very happy to answer any further questions you may have or

provide any further help we can in this regard.

Sincerely.

CHALMERS H. MARQUIS, Vice President.

MEMORANDUM ON THE STATUS OF PUBLIC BROADCASTING UNDER CURRENT COPYRIGHT LAW

Important questions have been raised in recent Congressional hearings about the rights and liabilities of public broadcasting under the current United States Copyright Law (i.e. the Copyright Statute enacted in 1909, as amended to this date, 17 U.S.C.A. Sec. 1 et seq.).

This memorandum is intended to present a concise summary of the public broadcasting legal position on the pertinent provisions in the present copyright law. It does not purport to be a comprehensive brief but rather a short statement of the copyright basis upon which public broadcasting has developed its clearance practices and formulated its revision proposals.

BASIC CONCEPTS

Fundamental to the public broadcasting position are two well-established propositions—one of American copyright law, and the other of American communications law.

Copyright Law.—Under the American Copyright Law, the exclusive rights of copyright owners are those—and only those—specifically granted in the law itself. Thus, no copyright liability can devolve from any use or application of a copyrighted work which is not expressly reserved to the copyright proprietor in the Copyright Act. As the United States Supreme Court stated in its recent decision in Twentieth Century Music Corp. v. Aiken (June 1975), in ruling against an ASCAP claim of non-dramatic music performance rights infringement:

"The Copyright Act of 1909... gives to a copyright holder a monopoly limited to specified "exclusive rights" in his copyrighted works . . . accordingly, if an unlicensed use of a copyrighted work does not conflict within an "exclusive" right confirmed by statute, it is no infringement of the holder's rights."
So also states Nimmer on Copyright, Sec. 100 at p. 374-376:

"A use of a copyrighted work is not an infringing act if such use does not fall within the scope of those rights expressly granted to the copyright proprietor. Thus privately reading a book or privately performing a dramatic work or even publicly performing a musical composition but not for profit all constitute uses of a copyrighted work which do not infringe the rights granted to the copyright proprietor. In this sense, the rights of a proprietor under the Copyright Act are rights of express enumeration..."

This statutory scheme has been continued in the successive versions of the sion Bill-with the copyright proprietors' protected rights current Copyright . detailed in Section 106, subject to the limitations and exemptions provided in

succeeding sections.

Under existing copyright law, the copyright proprietor's broadcast rights in non-dramatic musical and literary works are limited to performance in public (or publicly) "for profit"; no performance rights at all are provided for non-dramatic pictorial works. Nor are broadcast recordings anywhere specifically mentioned; whatever broadcast recording rights are claimed by copyright promentioned; whatever broadcast recording rights are claimed by copyright proprietors for published non-dramatic literary, musical and pictorial works must be sought either in the generic right to "print, reprint, publish, copy and vend" in Section 1(a), the particularized right to make a "transcription or record" of non-dramatic literary works in Section 1(c), or the compulsory license for "mechanical parts" with respect to musical works in Section 1(e). Whether or not so-called "synchronization" or "recording" rights come within these statutory categories, and to what extent the "for profit" restriction applies there as well, are clearly matters for judicial interpretation under the present law. Communications Law.—Under the federal communications law, public broadcasting is by definition non-commercial and non-profit in character. As to public television stations, Section 73.621 of the FCC Rules and Regulations provides as follows:

"S. 73.621 Non-commercial educational stations. In addition to the other provisions of this subpart, the following shall be applicable to non-commercial edu-

cational television and broadcasting stations:

"(a) Except as provided in paragraph (b) of this section, non-commercial educational broadcast stations will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service.

"(c) Noncommercial educational television broadcast stations may transmit educational, cultural and entertainment programs, and programs designed for use by schools and school systems in connection with regular school courses, as

well as routine and administrative material pertaining thereto."

With respect to public radio stations, Section 73.503 contains a similar but simpler provision to the effect that: "a noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program";

Section 73.621 and 73.503 are set out in full in Appendix A hereto.

The provisions of the Public Broadcasting Act of 1967—the basic charter for American public broadcasting—also emphasize the non-commercial character of public broadcasting and provide for the catablishment of a non-profit corporation, known as the Corporation for Public Broadcasting, with the express function of engaging in public interest activities necessary or desirable to assist non-commercial educational radio and television broadcasting. The pertinent sections of the Public Broadcasting Act are set out in Appendix B, including the specific authorization of national common carrier interconnection services for public broadcasting at free or reduced rates in Section 396(h).

broadcasting at free or reduced rates in Section 396(h).

Under the aegis of the Corporation for Public Broadcasting, the Public Broadcasting Service and National Public Radio have also been organized as tax-exempt non-profit corporations, the membership of which is limited to non-commercial, educational television and radio stations licensed as such by the

Federal Communications Commission.

SPECIFIC TYPES OF WORKS

The public broadcasting amendments proposed to the Senate and House Subcommittees for the Copyright Revision bills are by their own terms limited to public radio and television broadcast only of non-dramatic musical, literary and pictorial works. This memorandum therefore does not deal with translations, dramatizations or adaptations under Section 1(b) nor the dramatic works covered in Section 1(d) of the existing Copyright Law. While the legal considerations with respect to music, books and photographs are to some extent interrelated, they can probably best be examined separately in order:

Musical Works.—Under Section 1(e), the copyright proprietor has had, since 1909, the exclusive right to perform copyrighted non-dramatic music only when "publicly for profit". From early times in broadcasting, federal court decisions have affirmed that an over-the-air broadcast constitutes a public performance, and that commercial broadcasting is "for profit" even though direct listening or viewing fees are not charged (e.g., Remick v. American Auto Accessorie; 5 F. 2d 411 (6th Cir. (1925). No decision has, however, yet dealt directly with the appli-

cation of the "for profit" restriction to public broadcasting.

Two cases have been cited by the music industry as persuasive toward non-exemption: Associated Music Publishers v. Debs Memorial Radio Fund, 141 F. 2d 852 (2nd Circ. 1944) and Rohauer v. Killiam Shows Inc., 379 F. Supp. 723 (D.C.S.D., 1974). In the Debs Case, music licenses were required for sponsored and sustaining programs broadcast over a commercial radio station owned by a non-profit corporation as performed "publicly for profit". The decision itself has been seriously questioned as to reasoning; indeed, Professor Nimmer has even urged that the result in the Debs Case "goes beyond the proper place to draw the 'for profit' line" (Nimmer on Copyright, Sec. 107.32, p. 405, 406). The Debs

Case has therefore been widely regarded as clearly distinguishable from non-commercial, non-profit public broadcasting, which is supported primarily by public funds, active exclusively in educational and other public interest programing, and expressly forbidden from carrying advertising or selling air-time like commercial stations.

The Rohauer Case was principally concerned with the question of copyright infringement of a popular novel in its renewal term by a motion picture produced under license during its original term. It peripherally related to public broadcasting only in that the motion picture was later broadcast over an ETV station under license from the authorized film distributor, with financial assistance from a local banking institution. The New York court found that the banking underwriter was not liable for infringement damages in the absence of programmatic control and supervision. Thus, the Rohauer Case has little, if any, direct bearing on what constitutes a "for profit" broadcast for the purposes of

Section 1(e) of the Copyright Law.

There can be no question about the fundamental "ncnprofit" character of public broadcasting, for the purposes of Section 1(a) of the Copyright Law or otherwise. Public broadcasting stations are all non-commercial educational broadcast stations, licensed under FCC Regulations only to accredited non-profit educational organizations to furnish non-profit and non-commercial television broadcast services. Provision is also made in the FCC Rules for outside contributions, tax-exempt or otherwise, towards public broadcasting programs subject to standard requirements for on-air identification of the donors, with the specific provision that "no commercials (visual or aural) promoting the sale of a product or service shall be broadcast in connection with any program" and with strict restrictions on donor references to enforce that prohibition.

Similarly, under the Public Broadcasting Act of 1967, amending Section 397 of the Federal Communications Act of 1934, all of the national public broadcasting funding and distributing organizations are tax-exempt nonprofit agencies servicing only non-commercial educational broadcast stations licensed by the Federal Communications Commission. To paraphrase Nimmer on Copyright at p. 406 about the Debs Case, it is difficult to see what could be not-for-profit if public

broadcasting is not so considered.

ASCAP and others have argued that underwriting gifts from business corporations are equivalent to program sponsorship, and thus convert public television and radio programs into "for profit" broadcasts. This argument is not convincing, however, in the face of the FCC Act and Regulations which, as indicated above, specifically bar corporate advertising from public broadcasting and restrict corporate identification on public television and radio programs. It is difficult to see why corporate gifts—made without return consideration and without content control—should be considered for profit in nature simply because the donor company is identified by name in direct connection with financial contribution. It would also seem clear that if "for profit", such underwriter identification would be barred as advertising by the F.C.C., and conversely, that the very fact of F.C.C. permissibility should preclude a "for profit" judgment for federal copyright purposes.

Nevertheless, ASCAP, in its recent House testimony, has gone much further, and argued that what it considers to be the "for profit" broadcasting of a few underwritten programs should be taken to contaminate the whole of public broadcasting, including all of the non-underwritten national, regional and even local programs, which form the vast bulk of public broadcasting. Support for this view is sought in the Debs Case finding of music copyright infringements on the commercial station's sustaining programs by virtue of its considerable commercially sponsored programing. But this type of contamination argument by copyright holders has been decisively dismissed by the federal courts involved in the recent CBS v. Teleprompter cable television litigation, holding that sponsored CATV-origination programs have absolutely no effect on the question of copyright infringements in CATV-relayed programs, whether sponsored or sustaining (Columbia Broadcasting System v. Teleprompter Corp., 355 F. Supp. 618 (D.C.N.Y. (1972)); 476 F. 2d 338 (2d Cir. (1973)); 94 Sup. Ct. 1129 (1974). Finally, a great deal of weight must be given to the fact that never before

Finally, a great deal of weight must be given to the fact that never before has the assertion that public television or radio broadcasts may be "for profit" for the purposes of Section 1(e) been publicly urged throughout all the copyright revision hearings over the past ten years. Nor has any legal suit ever been brought by music authors or publishers, or the performing rights societies, to

contest the widely known "not-for-profit" position consistently and publicly

taken by public broadcasting representatives.

All of the above discussion primarily concerns so-called "performing" rights; there are additional issues regarding music "recording" rights for public broad-casting programs. Although there is no express music "transcription" or "rècording" provision in Section 1(e), such a music proprietor's right has at times been argued from the other language in that section—although never decisively confirmed by judicial interpretation. The fact that music interests have seldom asserted, if at all, that radio sound recordings are prohibited by Sec. 1(e) would seem to limit their claim to the so-called "synchronization" right for recorded television programs.

But even if the trade practice of licensing such "synchronization" rights for television films is accepted, there is still considerable legal controversy over whether the Sec. 1(e) compulsory license is not also applicable by its very terms. (See Nimmer on Copyright in Section 109.14 at p. 442). It has been ably contended that the music compulsory license applies at the 2¢ rate for television and radio commercial advertisements. See Note, The Applicability of the Compulsory License Provision to Radio and Television Advertising, 18 UCLA Law Review 1126 (1971), which also points out that the so-called "arranging right" in Section 1(e) is limited to performances and mechanical reproductions "publicly for profit" and so may not be applicable to public broadcasting at all (at p. 1134).

Indeed, the UCLA Note comment on public broadcasting appears to be well justified. From the statutory language, all Section 1(e) rights appear to be subject to the same "profit" limitations as the performance rights themselves. Accordingly, public broadcasting's performance rights exemption would easily seem to carry over to program recordings for public broadcast as well, and

this specific provision should take precedence over general interpretation of the copying right under Section 1(a) to exclude the "for profit" restriction.

Literary works.—Under Section 1(c), the exclusive rights pertaining to non-dramatic television works include the same "for profit" conditions as are applicable to music under Section 1(e). Hence, all of the above considerations applicable to public broadcast of non-dramatic music would seem equally relevant for non-dramatic literary works—especially since Section 1(c) was amended to include "performing" rights only as late as 1952, and the section itself refers

to broadcasting as so amended.

It is clear from the legislative history of the Section 1(c) amendment that, at the request of the Copyright Office, the addition of performance rights for nondramatic literary works was intentionally made subject to imposition of the "for profit" limitation as a quid pro quo at a time when non-commercial radio, if not non commercial television, had long been in existence. Consequently, there can be little doubt but that public broadcasting of non-dramatic literary works are exempt from copyright clearance or payment requirements.

Not so clear, however, is the wording of Section 1(c) on program recordings. For Section 1(c) reads as follows: "(c) To ... present the copyrighted work in public for profit if it be a ... non-dramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce or reproduce, it in any manner or by any method whatsoever."

The phraseology is not only redundant; the punctuation is also quite illogical. As a result, it must be admitted that whether or not program recordings for non-profit performances are within the copyright holder's rights is open to some doubt on the basis of the statutory language alone. Again, from its Congressional history, however, there is good reason to believe that the twin "for profit" restrictions in the first and third clauses should apply to the radio and television recordings which fall within the second clause. As commented in Note, Legal Publishers of Educational Television, 67 Yale Law Journal 663 at Footnote 107 (1958):

"The 'for profit' limitation is also missing from the recording provision of 1(c), which relates to non-dramatic literary property. But the committee report on this section nevertheless expresses the intention that the limitation apply. H.P. Rep. No. 1160, 82nd Cong., 2nd Sess. 2(1951)".

Certainly, only this interpretation would be sensible in the case of public broad-

casting, where the vast majority of radio and television programs are either prerecorded or re-recorded for broadcast.

Unfortunately, past practice has not been so consistent as to be of additional interpretative assistance; public broadcasting can point out that no legal claimhas ever been made by any author or publisher because of an unauthorized program recording; authors and publishers have testified that licenses have at times been sought and obtained by public broadcasting for non-dramatic literary works included in recorded programs. With the immense number of publishers and large number of public broadcasting agencies, there has obviously been no real body of experience indicating substantial consensus on either side, let alone agreement between both sides.

But a better guideline does perhaps exist in an allied field of copyright lawnamely, non-profit educational reprography. There, faced by a similar dilemma, the U.S. Court of Claims in Williams and Wilkins v. U.S., 487 F.2d 1345 (1973) held multiple duplication of scientific magazine articles to be within the doctrine of "fair use" pending further Congressional clarification in the Copyright Revision Act. Since the Court of Claims decision was affirmed by a divided Supreme Court last June, its ruling must be taken as the controlling law today. It is thus reasonable to believe that a similar position would be taken by the federal courts on the effect of Section 1(c) on public broadcasting program recording rights-

namely, in view of the legislative uncertainty, to hold against strict interpretation of copyright liability to till Congress clarifies the law.

Pictorial works.—The only provision applicable to non-dramatic pictorial works—i.e. excluding motion pictures, television programs etc.—is the general right granted in Section 1(a) "to print, reprint, publish, copy and record the copyrighted works". Consequently it would appear that no programs are the program are that no programs are the program are that no programs are that no programs are that no programs are the program are that no programs are that no program are the program are that no program are that no program are that no program are the program are the program are that no p copyrighted work". Consequently, it would appear that no performance rights apply to photographs, pictures etc., and this has been confirmed by Nimmer on Copyright in Section 107.1 at p. 399.

There is also serious doubt about the right of the copyright holder of a photograph or drawing to prevent television recordings for broadcast purposeswhether or not "for profit". The federal courts have in the past drawn distinctions between "transcriptions and records" under Sections 1(c) and (d) and "copies" under Section 1(a). And since there is no express "right to record" applicable to photographs and other pictorial works, it may well be that television recordings would not be held to be "copies" under Section 1(a)—especially in view of the historical definition of a "copy" as a perceptible representation since the U.S. Supreme Court decision in White-Smith Music Publishing Co. v. Apollo, 209 U.S. 1 (1908). This was undoubtedly what impelled the 1952 amendment of Section 1(c) to expressly include recordings and transcription rights for nondramatic literary works—and in the absence of a similar amendment for pictorial works, would point toward a finding of non-infringement in public broadcast pre-recordings.

As was stated in Mura v. Columbia Broadcasting System, 245 F. Supp. 587 (D.C.N.Y. 1956): "The evanescent reproduction of a hand puppet on a television series or on the projected kinescope recording of it is so different in nature from the copyrighted hand puppet that I conclude it is not a copy." (emphasis sup-

And, as the Mura Case also pointed out, it can well be argued that the brief flashing of a photograph on a television screen, whether the program is "live" or pre-recorded, constitutes "fair use", since of minimal exposure, not interfering with other sales nor substituting otherwise for the original work. This would seem to be especially true when the picture is used for an exemplary, analytical or informational purpose in a non-commercial public television program.

CONCLUSION

In view of the restricted nature of the statutory copyright monopoly and the non-profit character of the public broadcasting system, the inclusion of nondramatic music, literary or pictorial works on public television and radio programs would not appear to be copyright infringements under present law as cur-

rently interpreted in the federal courts.

As the United States Supreme Court said in Twentieth Century Music Corp. v. Aiken this last June: "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest. Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to

stimulate the artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors." Fow Film Corp. v. Dot al, 286 U.S. 123, 127. See Kendall v. Winsor, 21 How. 322, 327-328; Grant v. Raymond, 6 Pet. 218, 241-242. When technological changes has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."

It would seem that this judicial construction in the public interest must, in the case of public broadcasting, precionantly come out on the side of non-protection for the copyright proprietors and of non-liability for the public broadcasters.

APPENDIX A

PERTINENT RULES OF THE TEDERAL COMMUNICATIONS COMMISSION

SECTION 73.621

§ 73.621 Noncommercial educational stations.

In addition to the other provisions of this subpart, the following shall be

applicable to noncommercial educational television broadcast stations:

(a) Except as provided in paragraph (b) of this section, noncommercial educational broadcast stations will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service.

(1) In determining the eligibility of publicly supported educational organizations, the accreditation of their respective state departments of education

shall be taken into consideration.

(2) In determining the eligibility of privately controlled educational organizations, the accreditation of state departments of education or recognized regional and national educational accrediting organizations shall be taken into consideration.

(b) Where a municipality or other political subdivision has no independently constituted educational organization such as, for example, a board of education having autonomy with respect to carrying out the municipality's educational program, such municipality shall be eligible for a noncommercial educational television broadcast station. In such circumstances, a full and detailed showing must be made that a grant of the application will be consistent with the intent and purpose of the Commission's rules and regulations relating to such stations.

(c) Noncommercial educational television broadcast stations may transmit educational, cultural and entertainment programs, and programs designed for use by schools and school systems in connection with regular school courses, as

well as routine and administrative material pertaining thereto.

(d) A noncommercial educational television station may broadcast programs produced by or at the expense of, or furnished by persons other than the licensee, if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee. The payment of line charges by another station, network, or someone other than the licensee of a noncommercial educational television station, or general contributions to the operating costs of a station, shall not be considered as being prohibited by this paragraph.

(e) Each station shall furnish a nonprofit and noncommercial broadcast service. However, noncommercial educational television stations shall be subject to the provisions of § 73.654 to the extent that they are applicable to the broadcast of programs produced by, or at the expense of, or furnished by others, except that no announcements (visual or aural) promoting the sale of a product or service shall be broadcast in connection with any program: Provided, however, That where a sponsor's name or product appears on the visual image during the course of a simultaneous or rebroadcast program either on the backdrop or in similar form, the portions of the program showing such information need not be deleted.

NOTE 1: Announcements of the producing or furnishing of programs, or the provision of funds for their production, may be no more than twice, at the opening and at the close of any program, except that where a program lasts longer than 1 hour an announcement may

be made at hourly intervals during the program if the last such announcement occurs at least 15 minutes before the announcement at the close of the program. The person or organization furnishing or producing the program or providing funds for its production, shall be identified by name only, except that in the case of a commercial company having bona fide operating divisions or subsidiaries one of which has furnished the program or funds, the division or subsidiary may be mentioned in addition to or instead of the commercial company. No material beyond the company (or division or subsidiary) name shall be included. Upon request for waiver of this provision, the Commission may authorize the inclusion of brief additional descriptive material only when deemed necessary to avoid confusion with another company having the same or a similar name. No mention shall be made of any product or service with which a commercial enterprise being identified has a connection, except to the extent the name of the product or service is the same as that of the enterprise (or division or subsidiary) and is so included. A repeat broadcast of a particular program is considered a separate program for the purpose of this note.

Note 2: Announcements may be made of general contributions of a substantial nature which make possible the broadcast of programs for part, or all, of the day's schedule. Such announcements may be made at the opening and closing of the day or segment, including all of those persons or organizations whose substantial contributions are nariiag pussible the broadcast day or segment. In addition, one such general contributor may be identified once during each hour of the day or segment. The provisions of Note 1 of this section as to permissible contents apply to announcements under this note.

Note 3: The limitations on credit announcements imposed by Notes 1 and 2 of this section shall not apply to program material, the production of which was completed before January 1, 1971, or to other announcements broadcast befo

charitable foundations.

[§ 73.621(d) amended & (c) added eff. 6-17-70 & eff. date postponed to 11-30-70; Notes 1 & 2 amended and Notes 3, 4 & 5 added eff. 11-30-70; III (68)-11]

SECTION 73.503

§ 73.503 Licensing requirements and service..

The operation of, and the service furnished by noncommercial educational FM broadcast stations shall be governed by the following:

(a) A noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be

used for the advancement of an educational program.

(1) In determining the eligibility of publicly supported educational organizations, the accreditation of their respective state departments of education shall

be taken into consideration.

- (2) In determining the eligibility of privately controlled educational organizations, the accreditation of state departments of education and/or recognized regional and national educational accrediting organizations shall be taken into consideration.
- (b) Each station may transmit programs directed to specific schools in a system or systems for use in connection with the regular courses as well as routine and administrative material pertaining thereto and may transmit edu-
- cational, cultural, and entertainment programs to the public.

 (c) A noncommercial educational FM broadcast station may broadcast programs produced by, or at the expense of, or furnished by persons other than the licensee, if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee. The payment of line charges by another station, network, or someone other than the licensee of a noncommercial educational FM broadcast station, or general contributions to the operating costs of a station, shall not be considered as being prohibited by this paragraph.
- (d) Each station shall furnish a nonprofit and noncommercial broadcast service. Noncommercial educational FM broadcast stations are subject to the provisions of § 73.289 to the extent that they are applicable to the broadcast of programs produced by, or at the expense of, or furnished by others: however, no announcements promoting the sale of a product or service shall be broadcast in connection with any program.

Note 1: Announcements of the producing or furnishing of programs, or the provision of funds for their production, may be made no more than twice, at the opening and at the close of any program, except that where a program lasts longer than I hour an announcement may be made at hourly intervals during the program if the last such announcement

occurs at least 15 minutes before the announcement at the close of the program. The person or organization furnishing or producing the program, or providing funds for its production, shall be identified by name only, except that in the case of a commercial company having bona fide operating divisions or subsidiaries one of which has furnished the program or funds, the division or subsidiary may be mentioned in addition to or instead of the commercial company, No material beyond the company (or division or subsidiary) name shall be included. Upon request for waiver of this provision, the Commission may authorize the inclusion of brief additional descriptive material only when deemed necessary to avoid confusion with another company having the same or a similar name. No mention shall be made of any product or service with which a commercial enterprise being identified has a connection, except to the extent the name of the product or service is the same as that of the enterprise (or division or subsidiary) and is so included. A repeat broadcast of a particular program is considered a separate program for the pupose of this note.

Note 2. Announcements may be made of general contributions of a substantial nature which make possible the broadcast of programs for part, or all, of the day's schedule. Such announcements may be made at the opening and closing of the day or segment, including all of those persons or organizations whose substantial contributions are making possible the broadcast day or segment. In addition, one such general contribution may be identified once during each hour of the day or segment. The provisions of Note 1 of this section shall not apply to program material, the production of which was completed before January 1, 1971, or to other announcements broadcast before January 1, 1971, pursuant to underwriting agreements entered into before November 30, 1970.

Note 4. The provisions of Notes 1 and 2 of this section shall not apply during the broadcast times in which "auctions" are held to finance

purpose. Note 5: The numerical limitations on permissible announcements contained in Notes 1 and 2 of this section do not apply to announcements on behalf of noncommercial, nonprofit entities, such as the Corporation for Public Broadcasting, State or regional entities, or charitable foundations.

[\$ 73.503(c) amended & (d) added eff. 6-17-70 & eff. date postponed to 11-30-70; Notes 1 & f amended and Notes 3, 4 & 5 added eff. 11-30-70; III(68)-11]

APPENDIX B

PERTINENT PROVISIONS OF THE PUBLIC BROADCASTING ACT OF 1967

"SUBPART B-CORPORATION FOR PUBLIC BROADCASTING

"Congressional declaration of policy

"Sec. 396. (a) The Congress hereby finds and declares-

"(1) that it is in the public interest to encourage the growth and development of noncommercial educational radio and television broadcasting, including the use of such media for instructional purposes;

"(2) that expansion and development of noncommercial educational radio and television broadcasting and of diversity of its programing depend on freedom,

imagination, and initiative on both the local and mational levels;

"(3) that the encouragement and support of noncommercial educational radio and television broadcasting, while matters of importance for private and local development, are also of appropriate and important concern to the Federal Government:

"(4) that it furthers the general welfare to encourage noncommercial educational radio and television broadcast programing which will be responsive to the interests of people both in particular localities and throughout the United States.

and which will constitute an expression of diversity and excellence;

"(5) that it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make noncommercial educational radio and television service available to all the citizens of the United States;

"(6) that a private corporation should be created to facilitate the development of educational radio and television broadcasting and to afford maximum

protection to such broadcasting from extraneous interference and control.

"Corporation established

"(b) There is authorized to be established a nonprofit corporation, to be known as the Corporation for Public Broadcasting, which will not be an agency or establishment of the United States Government. The Corporation still be subject to the provisions of this section, and, to the extent consistent with this section, to the District of Columbia Nonprofit Corporation Act.

"Board of Directors

"(c)(1) The Corporation shall have a Board of Directors (hereinafter in this section referred to as the 'Board'), consisting of fifteen members appointed by the President, by and with the advice and consent of the Senate. Not more than

eight members of the Board may be members of the same political party.

(2) The members of the Board (A) shall be selected from among citizens of the United States (not regular fulltime employees of the United States) who are eminent in such fields as education, cultural and civic affairs, or the arts, including radio and television; (B) shall be selected so as to provide as nearly as practicable a broad representation of various regions of the country, various professions and occupations, and various kinds of talent and experience appropriate to the functions and responsibilities of the Corporation.

"Nonprofit and nonpolitical nature of the corporation

- "(f) (1) The Corporation shall have no power to issue any shares of stock, or to declare or pay any dividends.
- "(2) No part of the income or assets of the Corporation shall inure to the benefit of any director, officer, employee, or any other individual except as salary or reasonable compensation for services.
- "(3) The Corporation may not contribute to or otherwise support any political party or candidate for elective public office.

"Purposes and activities of the corporation

'(g) (1) In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a), the Corporation is authorized to-

"(A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of

programs of a controversial nature;
"(B) assist in the establishment and development of one or more systems of interconnection to be used for the distribution of educational television or radio programs so that all noncommercial educational television or radio broadcast stations that wish to may broadcast the programs at times chosen

by the stations;

(C) assist in the establishment and development of one or more systems of noncommercial educational television or radio broadcast stations through-

out the United States;

"(D) carry out its purposes and functions and engage in its activities in ways that will most effectively assure the maximum freedom of the noncommercial educational television or radio broadcast systems and local stations from interference with or control of program content or other activities.

"(2) Included in the activities of the Corporation authorized for accomplishment of the purposes set forth in subsection (a) of this section, are, among others

not specifically named-

"(A) to obtain grants from and to make contracts with individuals and

with private, State, and Federal agencies, organizations, and institutions; "(B) to contract with or make grants to program production entities, individuals, and selected non-commercial educational broadcast stations for the production of, and otherwise to procure, educational television or radio programs for national or regional distribution to noncommercial educational broadcast stations;

"(C) to make payments to existing and new non-commercial educational broadcast stations to aid in financing local educational television or radio programing costs of such stations, particularly innovative approaches

thereto, and other costs of operation of such stations;

"(D) to establish and maintain a library and archives of noncommercial educational television or radio programs and related materials and develop public awareness of and disseminate information about noncommercial educational television or radio broadcasting by various means, including the publication of a journal;

"(E) to arrange, by grant or contract with appropriate public or private agencies, organizations, or institutions, for interconnection facilities suitable for distribution and transmission of educational television or radio

programs to noncommercial educational broadcast stations;

"(F) to hire or accept the voluntary services of consultants, experts, advisory boards, and panels to aid the Corporation in carrying out the purposes of this section;

"(G) to encourage the creation or new noncommercial educational broadcast stations in order to enhance such service on a local, State, regional,

and national basis;

"(H) conduct (directly or through grants or contracts) research, demonstrations, or training in matters related to noncommercial educational televi-

sion or radio broadcasting.

"(3) To carry out the foregoing purposes and engage in the foregoing activities, the Corporation shall have the usual power conferred upon a nonprofit corporation by the District of Columbia Nonprofit Corporation Act, except that the Corporation may not own or operate any television or radio broadcast station, system, or network, community antenna television system, or interconnection or program production facility.

"(h) Nothing in the Communications Act of 1934, as amended, or in any other provision of law shall be construed to prevent United States communications common carriers from rendering free or reduced rate communications interconnection services for noncommercial educational television or radio services, subject to such rules and regulations as the Federal Communications Commission

may prescribe.

OCTOBER 15, 1975.

MEMORANDUM

Re: Amendment to the Copyright Revision Bill (H.R. 2223) adding & tion 118 to provide a compulsory license for non-dramatic works in public broadcasting programs

Text of amendment

The text of the public broadcasting compulsory license amendment as adopted by the Senate Judiciary Committee on October 7, 1975, is attached.

Background

Since the licensing of the first noncommercial educational radio and television stations in 1919 and 1952, respectively, noncommercial educational (public) broadcasting has been covered by the not-for-profit exemptions in Section 1 of the 1909 Copyright Law. It has therefore been public broadcasting's view that the current copyright law permits inclusion of non-dramatic, literary, musical and photographic works in educational television and radio programs without obtain-

ing clearance from or making payments to copyright owners.

Since the beginning of revision proceedings, both houses of Congress have shown a preference for removing the general not-for-profit exemptions and substituting specific exceptions or other special treatment where, after careful analysis, they appear to be in the public interest. In adopting the Mathias Amendment, the Senate Judiciary Committee has filled a previous gap in the current Revision Bill for public broadcasting, and with public broadcasting's concurrence has provided for royalty payments to copyright holders in return for ready availability of non-dramatic works. Thus a reasonable compromise has been found between total exemption and total non-exemption—in a manner similar to the compulsory license already provided for phonograph records, cable television and jukeboxes.

The purpose or effect of the public broadcasting compulsory license

The serious dangers in complete non-exemption for public broadcasting are three-fold. *First*, much important copyright material would necessarily become unavailable by reason of unavoidable clearance difficulties. *Second*, burdensome administrative structures and prohibitive clearance expenses would be newly required. *Third*, excessive royalty rates could be imposed because of unequal bargaining strength.

The compulsory license is thus aimed not only at achieving reasonable royalty rates for public broadcasting, but more importantly at ensuring availability for program use and reducing the burdens and expense of obtaining access. It would avoid individual negotiations with copyright owners to secure permissions to use

individual works, and hence eliminate prolonged delays and substantial administrative costs. Without the amendment, the number of copyrighted works requiring clearance could easily be in the hundreds of thousands every year, straining especially the infinitesimal budgets of local stations. Even those scarce resources would undoubtedly not pass to the copyright holders, but would be dissipated in needless administrative procedures.

With the compulsory license, public television and radio stations would have access to nondramatic copyrighted materials without having to undertake the costs and delays of securing individual permissions. Standard fees for the inclusion of such materials could, in the absence of industry-wide private agreements, be set by the Copyright Royalty Tribunal already established to handle royalty fee revisions for other compulsory licenses. Thus, an independent panel would decide, where the major parties cannot agree, what fair payment should be made

by public broadcasting for the use of copyrighted materials.

Basically, therefore, what the new section provides is similar to the compulsory licenses already in H.R. 2223 for CATV systems (section 111), record manufacturers (section 115) and jukebox operators (section 116). It differs from these others in two important respects, however. First, it calls for initial rate determination by the Copyright Royalty Tribunal. Second, it encourages the substitution of mutually acceptable arrangements for Royalty Tribunal determinations. In summary, the public broadcasting compulsory license provides ample possibility for the success of purely private arrangements—but where they cannot be accomplished, provides an objective mechanism for fair resolution of disagreements.

Need for amendment

Without the compulsory license, noncommercial educational broadcasting would be treated exactly the same as commercial broadcasting. But there are at least four critical differences between commercial and noncommercial broadcasting:

1. Public television and radio programs use more copyrighted material than their commercial counterparts. Situation comedies, cuiz shows, sports programs do not require significant access to copyrighted materials. Extensive music performances, historical programs, children's programs, informational and cultural programs—often unique to public broadcasting—do. With the increased use of copyrighted materials necessary for educational programming go increased clearance burdens.

2. Central to the philosophy of public broadcasting is repeated program use. One or two exposuces are maximum in commercial broadcasting, and are almost unheard of in public television. With repeated use goes vastly greater clearance

burdens, particularly with the use of music.

3. Most commercial stations do little, if any, local production which requires resort to copyrighted materials. Public broadcasting stations are built upon local production at large and small producing organizations throughout the country—not just in Hollywood and New York. With centralized production, commercial television can support large clearance staffs; with dispersed production, public broadcasting cannot.

4. To serve the functions that Congress and the American people intend for noncommercial broadcasting, its scarce resources should be spent on paying fair fees to the creators of copyrighted materials, not squandered in unnecessary

clearance procedures.

Status of negotiations between public broadcasting and copyright holders

At the request of the Senate and House Subcommittees, meetings were held continuously since last February to attempt to work out a non-legislative solution to public broadcasting's clearance and royalty problems. For several reasons,

such negotiations could not resolve those difficulties:

Music.—The music agencies originally proposed to jointly provide public broad-casting with blanket licenses for all copyrighted music at rates negotiated on a periodic basis, with rate disagreements to be subject to separate arbitration with each music organization. There is still no agreement, however, on the amount of initial fees and definite disagreement on the necessity for combined ather than separate arbitration. More importantly, at least one music agency has taken the firm position that any such joint agreement would require prior legisly ive relief from the antitrust laws.

Public broadcasting has indicated its unwillingness to abandon its efforts for a compulsory license now for a possible antitrust exemption later on. (What if the antitrust exemption is not ultimately adopted. If it is, what if mutually agreeable arrangements cannot ultimately be reached?) In the absence of a public broadcasting commitment, the music agencies have declined to go on with further negotiations on clearances and payments in the meantime—and so discussions have now been discontinued.

To public broadcasting, compulsory licensing as adopted by the Senate Committee appears to be the most direct and least complicated way to handle the problem. Not only is it consistent with established mechanism in the copyright law, but it contains an automatic antitrust exemption. Moreover, private arrangements can at any time be substituted for Royalty Tribunal decisions by virtue of section (a) (2) of the Senate Committee's amendment.

Literary works.—In the course of many meetings, the author/publisher or-

ganizations offered, as a substitute for the compulsory license, a so-called clearing office and recommended license form, maintaining that royalties, rights and access must remain the exclusive prerogative of authors and publishers. Public broadcasting has urged that a compulsory license would provide access to materials without damaging authors, would reduce administrative clearance costs over a clearing office for publishers, and would, in the end, permit increased royalties to be paid to authors.

Early on, the publishers organizations emphasized their inability to discuss rates or other essential licensing provisions because of serious antitrust questions. The authors' representatives also indicated that such matters must be left to the authors' sole discretion. In the fact of these deficiencies, public broadcasting declined to commit itself to abandonment of all compulsory license amendment efforts, but offered to continue discussions of possible clearance arrangements in the interim. Again, the authors and publishers refused this offerand so discussions have been discontinued for some time.

In the face of these antitrust and other problems, to public broadcasting only a compulsory license appears to offer a practical means of assured access and reasonable payment among the thousands of individual authors and publishers

concerned.

Photographs.—No discussions have been possible because there has been no copyright organization or other agency to deal with. No photographer or photographic agency has so far been involved sufficiently in recent copyright revision activities to participate in meetings or other discussions.

By the same token, it is virtually impossible to clear the use of photographs with individual photographers, who usually cannot be found in time to include the work. A compulsory license would permit use of pictures at fees acceptable

to both public broadcasting and photographers.

CONCLUSION

A public broadcasting compulsory license is a fair and workable compromise between a previous complete exemption—unacceptable to copyright holdersand a total non-exemption—unacceptable to public broadcasting. Accordingly, the Senate Amendment provides the best opportunity for a reasonable and lasting resolution of this problem.

- § 118. Limitation on exclusive right: Public broadcasting of nondramatic literary and musical works, pictorial, graphic, and sculptural works
- (a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a public broadcasting entity to broadcast any nondramatic literary or musical work, pictorial, graphic, or sculptural work under the provisions of this section.

(b) Public broadcasting of nondramatic literary and musical works pictorial, graphic, and sculptural works by a public broadcasting entity shall be subject to compulsory licensing upon compliance with the requirements of this

section. The public broadcasting entity shall-

(1) record in the Copyright Office, at intervals and in accordance with requirements prescribed by the Register of Copyrights, a notice stating its identity, address and intention to obtain a license under this section, and

(2) deposit with the Register of Copyrights, at intervals and in accordace with requirements prescribed by the Register, a statement of account and the total royalty fees for the period covered by the statement based

on the royalty rates provided for in subsection (c).

(c) Reasonable royalty fees for public television and radio broadcasts by public broadcasting entities shall be established by the Copyright Royalty Tribunal. Such royalty fees may be calculated on a per-use, per-program, prorated or annual basis as the Copyright Royalty Tribunal finds appropriate with respect to the type of the copyrighted work and the nature of broadcast use, and may be changed or supplemented from time to time by the Copyright Royalty Tribunal. A particular or general license agreement between one or more public broadcasting entities and one or more copyright owners prior or subsequent to determination of applicable rates determined by the Copyright Royalty Tribunal may be substituted for a compulsory license provided in this section.

(d) The royalty fees deposited with the Register of Copyrights under this section shall be distributed in accordance with the following procedures:

(1) During the month of July of each year, every person claiming to be entitled to compulsory license fees for public broadcasting during the preceding twelve-month period shall file a claim with the Register of Copyrights in accordance with the requirements that the Register shall prescribe by regulation. Notwithstanding any provision of the antitrust laws (as defined in section 1 of the Act of October 15, 1914, 38 Stat. 730; 15 U.S.C. 12 and any amendments of such laws), for purposes of this paragraph any claimants may agree among themselves as to the proportionate division of compulsory license fees among them, may lump their claims together, and may designate a common agent to receive payments on their behalf.

(2) On the first day of August of each year, the Register of Copyrights shall determine whether there exists a controversy regarding the statement of account or distribution of royalty fees. It the Register determines that no such controversy exists, the Register shall, after deducting reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Register finds the existence of a controversy, the Register shall certify to such effect and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases, the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fees by the Tribunal.

(3) During the pendency of any proceeding under this subsection, the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution, an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute

any amounts that are not in controversy.

(e) The compulsory license provided in this section shall not apply to unpublished nondramatic literary or musical works or to dramatization rights for nondramatic literary or musical works.

(f) As used in this section, the term-

(1) "public broadcasting" means production, acquisition, duplication, interconnection, distribution, and transmission of educational television or radio programs (as defined in section 397 of the Federal Con of 1934 (47 U.S.C. 397)) by or for noncommercial educational broadcast stations (as defined in section 397 of the Federal Communications Act of 1934 (47 U.S.C. 397)), except as may be otherwise exempted under sections 110(2), 111(a)(2) and (4), 112(b), and 114(a); and (2) "public broadcasting entity" means any licensee or permittee of a noncommercial educational broadcast station, or any nonprofit institution or organization engaged in public broadcasting.

Chapter 8.—COPYRIGHT ROYALTY TRIBUNAL

§ 801. Copyright Royalty Tribunal: Establishment and purpose

(a) There is hereby created in the Library of Congress a Copyright Royalty Tribunal.

(b) Subject to the provisions of this chapter, the purpose of the Tribunal shall be: (1) to make determinations concerning the adjustment of the copyright royalty rates [specified by] as provided in sections 111, [and] 115, 116, and 118 so as to assure that such rates are reasonable and in the event that the Tribunal shall determine that the statutory [royalty] rate, or a rate previously established by the Tribunal, or the [revenue] basis in respect to such rates, [section 111,] does not provide a reasonable royalty fee for the basic service of providing secondary transmissions of the primary broadcast transmitter or is otherwise unreasonable, the Tribunal may change the royalty rate or the [revenue] basis on which the royalty fee shall be assessed or both so as to assure reasonable royalty fee; and (2) to determine in certain circumstances the distribution of the royalty fees deposited with the Register of Copyrights under sections 111, [114 and] 116, and 118.

§ 802. Petitions for the adjustment of royalty rates

(a) On [July 1, 1975,] January 1, 1980, the Register of Copyrights shall cause to be published in the Federal Register notice of the commencement of proceedings [for the review of the royalty rates specified by sections 111, 114, and 115,] with respect to the royalty rates as provided in sections 111, 115, 116, and 118.

(b) During the calendar year [1982,] 1990, and in each subsequent [fifth] tenth calendar year, any owner or user of a copyrighted work whose royalty rates are specified by this title, or by a rate established by the Tribunal, may file a petition with the Register of Copyrights declaring that the petitioner requests an adjustment of the rate. The Register shall make a determination as to whether the applicant has a significant interest in the royalty rate in which an adjustment is requested. If the Register determines that the petitioner has a significant interest, he shall cause notice of his decision to be published in the Federal Register.

§ 803. Membership of the Tribunal

(a) In accordance with Section 802, or upon certifying the existence of a controversy concerning the distribution of royalty fees deposited pursuant to section 111, [114,] 116, and 118, the Register shall request the American Arbitration Association or any similar successor organization to furnish a list of three members of said Association. The Register shall communicate the names together with such information as may be appropriate to all parties of interest. Any such party within twenty days from the date said communication is sent may submit to the Register written objections to any or all of the proposed names. If no such objections are received, or if the Register determines that said objections are not well founded, he shall certify the appointment of the three designated individuals to constitute a panel of the Tribunal for the consideration of the specified rate or royalty distribution. Such panel shall function as the Tribunal established in section 801. If the Register determines that the objections to the designation of one or more of the proposed individuals are well founded, the Register shall request the American Arbitration Association or any similar successor organization to propose the necessary number of substitute individuals. Upon receiving such additional names the Register shall constitute the panel. The Register shall designate one member of the panel as Chairman.

(b) If any member of a panel becomes unable to perform his duties, the Register, after consultation with the parties, may provide for the selection of a suc-

cessor in the manner prescribed in subsection (a).

§ 804. Procedures of the Tribunal

(a) The Tribunal shall fix a time and place for its proceedings and shall cause notice to be given to the parties.

(b) Any organization or person entitled to participate in the proceedings

may appear directly or be represented by counsel.

(c) Except as otherwise provided by law, the Tribunal shall determine its own procedure. For the purpose of carrying out the provisions of this chapter, the Tribunal may hold hearings, administer oaths, and require, by subpoena or otherwise, the attendance and testimony of witnesses and the poduction of documents.

(d) Every final decision of the Tribunal shall be in writing and shall state the reasons therefor.

(e) The Tribunal shall render a final decision in each proceeding within one year from the certification of the panel. Upon a showing of good cause, the Senate Committee on the Judiciary and the House of Representatives Committee on the Judiciary may waive this requirement in a particular proceeding.

§ 805. Compensation of members of the Tribunal; expenses of the Tribunal

(a) In proceedings for the distribution of royalty fees, the compensation of members of the Tribunal and other expenses of the Tribunal shall be deducted prior to the distribution of the funds.

(b) In proceedings for the **[**adjustment**]** determination of royalty rates, there is hereby authorized to be appropriated such sums as may be necessary.

(c) The Library of Congress is authorized to furnish facilities and incidental service to the Tribunal.

.(d) The Tribunal is authorized to procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code.

§ 806. Reports to the Congress

The Tribunal immediately upon making a final determination in any proceeding for adjustment for a statutory royalty with respect to royalty rates, shall transmit its decision, together with the reasons therefor, to the Secretary of the Senate and the Clerk of the House of Representatives for reference to the Judiciary Committees of the Senate and the House of Representatives.

§ 807. Effective date of royalty adjustment

- (a) Prior to the expiration of the first period of ninety calendar days of continuous session of the Congress, following the transmittal of the report specified in section 806, either House of the Congress may adopt a resolution stating in substance that the House does not favor the recommended royalty [adjustment] determination, and such [adjustment,] determination, therefore, shall not become effective.
 - (b) For the purposes of subsection (a) of this section

(1) Continuity of session shall be considered as broken only by an adjournment of the Congress sine die, and

(2) In the computation of the ninety-day period there shall be excluded the days on which either House is not in session because of an adjournment of more than three days to a day certain.

(c) In the absence of the passage of such a resolution by either House during said ninety-day period, the final determination by the Tribunal of a petition for adjustment of royalty rates by the Tribunal shall take effect on the first day following ninety calendar days after the expiration of the period specified by subsection (a).

(d) The Register of Copyrights shall give notice of such effective date by publication in the Federal Register not less than sixty days before said date.

§ 808. Effective date of royalty distribution

A final determination of the Tribunal concerning the distribution of royalty fees deposited with the Register of Copyrights pursuant to sections 111 and 116 shall become effective thirty days following such determination unless prior to that time an application has been filed pursuant to section 809 to vacate, modify or correct the determination, and notice of such application has been served upon the Register of Copyrights. The Register upon the expiration of thirty days shall distribute such royalty fees not subject to any application filed pursuant to section 809.

§ 809. Judicial review

In any of the following cases the United States District Court for the District of Columbia may make an order vacating, modifying or correcting a final determination of the Tribunal concerning the distribution of royalty fees—

(a) Where the determination was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in any member of the panel.

(c) Where any member of the panel was guilty of any misconduct by which the rights of any party have been prejudiced.

QUESTIONS AND ANSWERS ON THE MATHIAS AMENDMENT; COMPULSORY LICENSE FOR PUBLIC BROADCASTING

Question 1. Won't the Mathias amendment permit noncommercial broadcasters to dramatize, without permission, a book or short story and therefore prevent the author from selling adaptive rights to the movies or commercial television?

Answer. No. The most common misunderstanding of the Mathias Amendment reflected in many letters to senators has been that the Amendment would permit an author's work to be dramatized without specific permission. The Mathias Amendment does not cover dramatic works, the dramatization of nondramatic works or the use of unpublished works. These uses would continue to be subject to individual negotiation; the author would in no way be hindered from making a sale of movie or commercial television rights. Subsection (b) of the Amendment attached makes this explicit. The Amendments would, however, cover the simple reading or recital of poems, short stories or portions of a book. Simple reading or recital will not hinder the ability of an author to sell a work for film or television dramatization.

Question 2. Even though the amendment does not apply to unpublished or dramatic works, won't the reading of nondramatic works hurt the author? Shouldn't the author have the right to refuse permission or charge a price different than the price established pursuant to the amendment?

Answer. In the case of noncommercial television, the reading of such works has been occurring since 1952 without any claims of damage to authors, except to the extent that authors were not paid by virtue of the not-for-profit exemption. Under the Mathias Amendment, authors will be paid. Moreover, to say that the mere reading of a story or poem—where it is paid for—will hurt the sales of such story or poem or other work is not convincing. Indeed, the opposite result will more probably occur. Furthermore, except for readings of entire works over radio to the blind, readings which exhaust an entire story are uncommon on radio or television. More common are readings of excerpts or shorter works of the classics which are done primarily for educational purposes and will promote the works of that author.

Question 3. Isn't it true that public broadcasting was not exempt from obtaining copyright clearances under the 1909 law? Doesn't the revision bill simply

clarify and make explicit this non-exemption?

Answer. While there does exist certain doubts about the status of mechanical or recording rights under the 1909 law, there is no doubt about performing rights exemption for public broadcasting. With the exception of a brief period in the sixties, public broadcasting as a general practice has not cleared copyrighted material. No court decision has ever been rendered holding that non-commercial educational broadcasting was subject to copyright liability for the broadcast or nondramatic works. As a practical matter, public broadcasting entities do not now clear and pay for copyrighted materials. This would change radically under the Revision Bill.

Question 4. Doesn't the Mathias amendment result in copyright holders

unfairly subsidizing public broadcasting?

Answer. Categorically not. As stated by Senator Mathias when the Amendment was introduced: "The aim of the public broadcasting compulsory license proposal is to establish a viable mechanism for simplified copyright clearances and for appropriate royalties payments with a minimum of operational delays and administrative expense. It is not intended in any way to avoid fair payment of copyright royalties to authors and publishers for use of their works."

Royalty rates would ultimately be established by the Copyright Royalty Tribunal which would listen to the arguments of both sides and determine a fair rate. This mechanism would be used only if the arties themselves failed to agree on a fair rate. There is no evidence that suc_ rates would be lower than those which would be privately negotiated.

Question 5. Doesn't the Mathias amendment deprive the author or composer of his or her most basic rights under copyright—the right to refuse permission.

to someone to use his or her work?

Answer. The 1909 copyright law has for many years allowed nonprofit users to use materials on non-commercial educational broadcasting without securing permission, and the interest of copyright holders has overwhelmingly been in payment for use rather than prohibition of use. There has always been in the Copyright Act a balancing between the public interest in available use against

the private interest in monopoly control. This balancing of interests is central to the copyright law and was best described by the Supreme Court in Twentieth Century Music v. Aiken: "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest. Creative work is to be encouraged and rewarded but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the arts."

Question 6. Why does public broadcasting not request the establishment of a

statutory rate as in the other compulsory licenses in the bill?

Answer. Public broadcasting is willing to leave rate setting to a panel of professionals rather than ask Congress to get into this difficult area. Moreover, it recognizes that rate establishment in this complicated and difficult area must, of necessity, take a great deal of additional research and consideration involving detailed presentations on both sides d for which copyright revision should not be postponed. Public broadcasting: nerefore willing to abide by the decision of a panel of unbiased professionals, ather than argue about levels of royalties before Congress.

SILVER SPRINGS, MD., July 7, 1975.

Hon. Robert W. Kastenmeier. House Office Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: On the advice of your staff member, Mr. Herbert Fuchs, I am reiterating my letter of Sept. 2, 1974, with which I asked you to consider including some provisions into the new copyright law to protect armorial bearings. Since you failed to call me for one of your hearings, despite your letter RWK:hfg of Sept. 6, 1974, I am respectfully requesting that the enclosed presentation be included into the hearing records. In fact, I would very much appreciate it, if I would receive a copy of this part of the record once it is published.

Present procedures to copyright coats-of-arms are inadequate. Yet, these symbols of nobility of spirit, integrity and family coherence desperately need protection. They are a form of our cultural inheritage worthy of your concern, because they are a part of our civilization that reaches as far back into the past as to be a link with the totems painted on the walls of caves by early man. You would become the hero of thousands of people, if new special provisions would allow them to forego begging foreign heraldic authorities to register their assumed arms. You would also prevent many more thousands from getting cheated by those unscrupulous opportunists running the "heraldic mills."

I take the liberty of including some background material with my presentation and hope that it will find your interest. If you should have any questions, I would

be glad to try to provide you with the correct answers.

With best wishes, I remain Sincerely yours,

WALTER ANGST.

Enclosure. .

Suggestions re. S. 1361 by Walter Angst, Heraldic Artist To prevent—as it is possible today—that someone can usurp armorial bearings (see glossary), copyright them, and then defend them in a court of law against the rightful owner,

the following provisions cught to be incorporated into the new law:

An applicant to register a claim to copyright a cont-of-arms must furnish incontestable proof that he is entitled-either by inheritance through the direct male line, or by assumption via a genuine new creation only—to the blazon (see glossary) he submits for protection, testifying in both instances under oath as to the accuracy of his claim and the validity of the sources quoted. If he is found lacking adequate proof that he is entitled to the blazon submitted, the application for copyright shall be refused. If he is found, by due process of law, guilty of perjury, he shall be punishable under law. If he is found, by due process of law, guilty of usurpation of someone else's blazon, or emblazonment (see glossary), he shall be punishable under law.

Any new creation of arms (see glossary) submitted for copyright protection shall be:

1. Heraldically correct, i.e. obeying all major rules of good heraldry, but especially;

2. Without infringement on anyone else's arms;

3. Unmistakenly identifying the armiger;

4. Unique;

5. Heraldically stylized in its emblazonment;

6. As simple as possible;

7. Recognizable at a glance, at a reasonable distance;

8. Symbolically meaningful;

9. Artistically satisfying;

10. A unit in style, and also reflecting national origin;

11. Adapted to the medium used to depict them; and

12. Described by a "blazon", i.e. the universally recognized ancient technical language of heraldry, which is as precise as a chemical formula and which has not basically changed since the 16th century.

Protection by copyright of new arms shall not be construed as an intent to encroach upon the rights of an armiger whose existing arms are unwittingly duplicated: If two identical claims are contested in a court of law, the lossing party shall be compelled to suitably "difference" (see glossary) its arms before

they can be copyrighted anew.

Copyrights for armorial devices must cover both the blazon and the individual emblazonment, due to the peculiar nature of heraldry. Thus, proper protection requires a new category, a separate form, to register a claim to copyright an armorial achievement (see glossary) in all its many possible manifestations, such as an assumed, newly created coat-of-arms, flag, armorial banner, seal, letter-head, Ex Libris, badge, etc. This category must allow protection of varying depicitions in differing media of the same blazon, but each needing individual designing according to the medium used: the same basic design, adapted to the rectangle of a flag, the rounded of a seal, the triangle of a shield, the confines of an Ex Libris, etc. must be covered by the same claim.

Such copyright should be coterminous with the life of the registrant. Due to the nature of arms (they are really synonymous with a surname), the limitations on the duration of copyright protection as applied for works of art are not appropriate. The protection should be infinitely renewable by heirs upon

proof of inheritance—for each heir's lifetime in each case.

Armorial devices or heraldic insignia shall be considered to be those that are traditionally included within the gamut of the Law of Arms (as part of Common Law jurisprudence), not provided for under the Act pertaining to trade-marks and use-marks. The Law of Arms shall be interpreted by the Court having jurisdiction (U.S. District Court), which may give such regard to the Law of Arms of England, Scotland, Ireland, or any other relevant jurisdiction, as practiced at the present day, in the same fashion and according to the same customs as the practice in other Common Law jurisdictions is regarded in causes tried at common law by courts of the United States. Therefore, the products—usually fraudulent in their correctness of research, as well as their heraldic and artistic qualities—of those well known mail-order houses (heraldic mills), that peddle their many copies of usurped coats-of-arms to everybody with the appropriate same surname and thus fleece the uninformed American public of enormous sums annually, cannot be considered admissible for copyright protection. (Most of their listings are in the public domain anyway, even when they are rendered incorrectly.)

In cases where the heraldic character of a device is uncertain, and for advice as to the practices observed in the heraldic tradition, the Court shall have recourse to a lay assessor learned and knowledgeable in these matters, to be appointed by the Court. One permanent assessor should be an official of the Copyright Office of the Library of Congress. Junctioning as the "Herald of the

United States."

This official should have the power to make rules and regulations and final determinations as to what is admissible into the heraldic copyright register, as well as specific authority to maintain a register of approved or certified heraldic artists and researchers. In the event of conflict between entries in the normal registers of trade- and use-marks maintained by the Patent Office, and entries in the Copyright Office's Heraldic Register, the judgment of this official should prevail. (Fictitious example: Thus, should the State of Maryland seek to register as a trademark the entire achievement of Lord Calvert, as a descendent (and heir to the peerage) seek to register by copyright the arms and peerage appurtenances the State now uses in contention, some authority should exist to give the blood heir precedence over the usurping government agency.)

GLOSSARY

armiger: one who possesses armorial bearings

armorial achievement: the total armorial display including the exterior decorations

armorial bearings: a coat-of-arms of any person, or body corporate who is armigerous, i.e. who has the right to bear such a heraldic device

arms: a coat-of-arms

blazon: a concise and complete verbal description of a coat-of-arms according to a set of rules, which allows a competent heraldic artist to accurately depict it without ever having seen it. The blazon is the deciding factor in establishing, rendering and preserving any coat-of-arms in all its variations.

difference: additions to a coat-of-arms to distinguish between the various persons, or branches of houses who are entitled to wear them. There are marks of difference for cadency, distinction, bastardy (marshalling) augmentation, adop-

tion and mourning.

emblazonment: graphical depiction in colors of a coat-of-arms. The same arms emblazoned by different artists will look slightly different, although each artist faithfully abides by the blazon, because the same blazon can be rendered either timidly, or boldly, either conventionalized, or stylized to the point of fracturing the forms, either ugly, or beautiful in its proportions, either copied, or innovative, etc. Moreover, arms can be emblazoned in painted, printed, photographed, engraved, carved, embroidered, sculpted, etc. form, and each time the emblazonment will vary in its character.

law of arms: the corpus lex heraldica governing the use of arms, containing the rules, regulations and customs observed by both heralds and armigers: (for instance: armorial bearings are heritable property; their inheritance is patri-

linear and by primogeniture).

new creations of arms: any American, as a free, ultimately selfgoverning citizen of a sovereign republic, has the undisputed prescriptive right to assume arms, as long as they conform with the 12 points stated on pg. 1 & 2.

CREDENTIALS

In a professional field that is unregulated by law, that has no universally acknowledged standards, that requires neither licensing, nor registration of its practitioners, and for which there is no formal education, nor degree, it is very difficult to present credentials of qualification. All I can document is the following, and since there is no one else to speak for me, I must do it myself. Thus, I beg your indulgence for my immodesty.

I am a practicing heraldic artist with a reputation for delivering outstanding quality-work, for professional integrity, personal honesty and unusual creativity. For 40 years now, I am a scholar of heraldry, vexillogy, onomastics, sigillography, symbolism, genealogy and iconography. I work in a dozen languages, in-

volving state-, communal-, guild-, family-, and ecclesiastic heraldry.

Besides writing the only regular question-and-answer column for heraldry in America (Breviarium Heraldicum) for the last seven years, I had a number of articles published concerning principal issues and pioneer efforts, which have found international acclaim as well as controversy. I have instructed various classes in heraldry and vexillology, notably the first one ever to be given for the Smithsonian Institution. In fact, I am functioning as this institution's unofficial consultant in these fields, and I continue to lecture on these artful sciences (or scientific arts). I have exhibited my work and have appeared on radio and TV.

My clients include not only ordinary citizens, but also a President of the U.S., a Supreme Court Judge, a U.S. Senator, a Congressman, the U.S. Navy, and various other organizations. My specialty is the creation of new designs for armorial bearings by expressing modern ideas with ancient, as well as newly invented symbols. My work, which is strictly individual, encompasses not only paintings—on a special parchment-paper, wood, cloth, glass, or leather—but also wood-, and leather-carvings, marquetry, stained glass, embroderies, lithopanes, furniture decorations, and engravings. I am currently working on an illustrated

book about the unique Heraldry of Switzerland.

Publications: "An Armorial Banner for President Kennedy" in: The Augustan, vol. X, no. 4. August 1967.

"Breviarium Heraldicum", bimonthly column on advice, opinion & comment, in the Genealogical Acorn, the Augustan, Forbears, from February 1968-Spring 1974.

"Some Aspects of Heraldry in Switzerland" in: Genealogy & Heraldry, vol I,

no. 2, April 1968.

"German Genealogical Symbols" in: Genealogy & Heraldry, vol. I, no. 4,

'Commentary by Walter Angst", ditto, both issues.

"Arms of Americans of Swiss Ancestry" in: Genealogy & Heraldry, vol. II, no. 1, Spring 1969.

"The Pelinicus, a New Heraldic Sea Monster" in: The Augustan, vol. XIII,

no. 1, January 1970.

"Pentasexual Herald, y" in: The Augustan, vol. XIII, no. 6, November 1970.

"The Flag of 'Helping Hands'" in: Report of the Third International Congress of Vexillology the Flag Bulletin, vol. X, no. 2-3, Spring/Summer 1971.

"Heraldry Help!" in: Forebears, bimenthly question-and-answer column, years 73 and 74.

"Heraldry in a Republic" in: Forebears, book 2, vol. XVI, no. 2, April 1973. "Heraldic Plan for Redesign of the State Flags" in: Smithsonian, vol. IV, no. 4, July 1973.

"Sovereignty, Identity, Morality" in: Forebears, book 5, vol. XVII, no. 1,

Summer 1974.

"A Banner at Its Best" in: Maryland, vol. VII, no. 1, Spring 1975.

"The Heraldry of Switzerland", embellished with history tradition & folklore with 400 drawings; book in preparation, publication undetermined.

[From Forebears, Spring 1973]

ESSAY: HERALDRY IN A REPUBLIC

(By Walter Angst)

The following article is presented as a contribution to the continuing discussion of U.S. heraldry in general (see XV:4, "Thoughts Pertaining to U.S. Heraldry") and fraud in heraldry in particular (see XV:4, "Committee Against Frauc in Hegaldry"). The author has asked that it be noted that this article was written and sent prior to receipt of the last issue of the journal containing the reprint of the article by Barnes and Koepnick ("A Federal Heraldic Authority for the United States of America", XVI:122-23).

Most people today know very little about heraldry. If they actually know the term, they equate heraldry with a superfluous, slightly silly, antiquated, stuffy frill that has something to do with royalty and nobility, and relegate it to the dusty attics of the ones whom they think pretentious.

It seems to me that most U.S. citizens who are knowledgeable about heraldry contribute unwittingly to this attitude of disdain with which heraldry is being held by the unitiated, by consistently overlooking one important aspect of the art: the fact, that heraldry in a republic is, and must be, different (but is not any less!) from the one in a monarchy. They are transfixed in their orientation to taking most of their clues from those heraldic jurisdictions only, which are ruled by a princely sovereign, a king or queen.

Most U.S. heraldists are so firmly steeped in their beliefs that only those arms are acceptable as genuine which have been granted by a royal sovereign; they begin to "swim" when they are confronted with the need for a new heraldic creation, i.e. assumption of arms. In their opinions, such are permissible only if confirmed by an officer duly appointed by a royal person, even though this person may not hold de facto (nor even de jure) power ever the "subject" in question who wishes to assume arms, but who may happen to live in a territory once held by a predecessor of the royalty.

For the purpose of establishing an accepted, healthy, regulated heraldic tradition in the United States, all this is really unnecessary. In fact, for a free citizen r of a sovereign republic, to beg a royal officer of a foreign nation for permission to bear arms is rather ludicrous! We don't really need to, because there is a

nobility which is much older than the one conferred by any royal "fountain of honor": the original nobility.

Original not any was based on three premises: A man had to be free born; he had to over ind; and he had to be able to provide military service to his sovereign. Thus he was an armiger. (Robert Gayre of Gayre and Nigg, The Nature of Arms. Oliver & Boyd, Edinburgh, 1961. Chapter 1.)

Moreover, throughout history, people who were sovereign, i.e. who held actual political power to govern (in theory and in fact) a territory, were considered to be entitled to grant arms. This pertained not only to princely sovereigns, but

to republics as well, where this granting power usually was delegated.

In a republic the concept of classical nobility based on feudalism makes no sense at all. If a citizen of a modern republic, that expressly excludes the priviledges of birth, title, rank, and theoretically of possession, wishes to use armorial bearings, he really has logically only one choice: to derive his status, not by the grace of either an imaginary or a foreign princely sovereign, nor from any feudalistic values, but from the concept of original nobility-

With his coat of arms he expresses neither privilege of birth, nor title, nor rank, nor possession, and in the case of assumption of arms, not even of his succession in a genealogical chain, but simply his dedication to principles of chivalric, civilized conduct, his pledge to the "nobility of spirit" and nothing else,

Of course he also establishes a tradition for his children and his children's children, who might come to know their arms even before they learn to tell time. He thus sets a standard of high values for the future, that have really nothing to do with any arrogant claim to the glory of deeds which might, or might not, have been performed a long time by people who might, or might not, be actually related to his family.

There is a historic precedent for all of this: Switzerland, which never was a monarchy. In Switzerland, where people always ruled themselves, the heraldry of the cantons, the communities, the guilds, the ecclesiastics, and the families, is today still more alive, more widespread, and more beautiful (because simpler) than in most monarchies. The right of the citizen to freely assume arms is based on the original nobility, which has remained unchanged: a Swiss is free-born, he owns land, either privately or communally, and he most certainly has always been able to provide military service to his sovereign, his "home community."

Now, we citizens of the United States are free born. We own land, either privately or communally—the Federal lands belong to all of us—and we are able to provide military service to our sovereign, the Republic of the United States.

We live in an independent state. Admittedly, we gained our sovereignty by an act of rebellion against a legitimate ruler. That does not change the fact that we are ruling ourselves, albeit in an increasingly indirect way. Unless we want to return the United States to the rulership of the British Crown, we must admit therefore that we U.S. citi ens are in a position to assume arms. We are our own "fountains of honor." Naturally, we need a regulatory agency to do that effi-

I realize that for some of my colleagues, this is heresy, but if we heraldists would look more to the shiny example set by our ancient sister Republic of Switzerland in the use of heraldry, instead of being hypnotized by our fixation with the heraldic customs of the monarchies, we would have an easier time to convince our fellow citizens of the need to protect, regulate and develop heraldry

in this country.

If we claim original nobility and our being a part of a sovereign people as the basis for having the right to assume arms, we are not only free to establish own rules for a kind of heraldry suited to our Republic, we also must set clear standards: when we assume arms, we must at the some time assume, voluntarily and without reservations, the willingnes to demonstrate, day by day and with all our neighbors, that our being armigerous obligates us to a conduct of personal integrity, honesty and civility; to what I call "nobility of spirit."

For heraldists, this includes an aspiration to a high level of professionalism—of ethics of expertise. It includes the policing of our own fields of endeavers. It includes the elimination of the shysters who unscrupulously prey on the ignorance and greed of the uninformed. This, however, cannot be done by a committee against fraud alone: no amount of letter writing will induce hardboiled, cynical businessmen to cease and desist from making a fast buck off those among the public who are ignorant and greedy enough to want "their family-crest" for a few

dollars from some mail order firm.

The time has come for us to earnestly consider working for the establishment of an official, Federal certification of heraldic artists. By this I mean not merely a licensing, but a certification based on rigorous professional standards enforceable in a court of law. This requires Federal legislation which outlaws the foul practices of those business-minded people who exploit the heraldically unwary: Federal legislation, which sets up a nationwide non-commercial (although self-supporting) scientific clearinghouse for armorial bearings, ultimately responsible to Congress, that is empowered by law to check, register, and protect new assumptions of arms, as well as safeguard the legitimate rights and interests of heraldic artists.

In my opinion, nothing less will do, as a first step, to drive the "heraldic mills" out of business.

It is clear to me that such legislation is very hard to obtain. It is also clear to me that it will remain utopic to attain, as long as a majority of heraldists are caught up in the indulgence of nostalgic admiration of all things monarchic only, instead of actively considering the harsh necessities of modern life in a republic.

SOVEREIGNTY, IDENTITY, MOBALITY

(By Walter Angst)

As a supplement to Mrs. Diane Hartung's, essay ("Heraldry in the United States", Book four, pg. 502), I would like to contribute a few more thoughts to the ongoing discussion of the complex problems of regulating, protecting and developing our ancient scientific art in an egalitarian society.

The only practical approach that will lead us nearer to a clearing of the heraldic wilderness in the U.S. must be sought in the adherence to three princi-

ples: sovereignty, identity and morality.

As I have tried to point out in my own essay ("Heraldry in a Republic," Book three, pg. 183), we have, as citizens of a sovereign republic, the unquestionable right to assume arms. We may copyright our assumptions, and I have for years induced my clients to do so. Moreover, I have had a number of fruitful discussions of the technical problems involved with the Head of the Art Section in the U.S. Copyright Office, and I believe that an expansion of the law to include a specific category to copyright new coats-of-arms should be relatively easy to accomplish.

I might add that in my experience it is important to copyright both the blazon and the emblazonment at the same time. So far, the best way to do this, is to consider the achievement as an illustrated book and proceed accordingly.

As we know, this alone is, however, not enough to either regulate or protect armorial bearings in general. It would seem that a possibility to further our aims is given by the fact that the U.S. Constitution permits the States to retain all those sovereign rights that are not explicitly claimed by the Federal government. Thus, for example, a bill passed both Houses of the South Carolina Legislature in 1972, stating that the Common Law of England is continuing in full force in that State. Mr. James Haynsworth, Esq. of Columbia, with whom I correspond about this, observed that the English Law of Arms is part of the Common Law and therefore would be applicable in South Carolina. Coat armor could be considered personal property under that law and should be protected by the courts of his State.

I am sure that similar conditions exist in other States. We only need to find legislators, or a state attorney general, sympathetic to our cause who will guide a State government into assuming responsibility for registering, or even granting arms. The norm for granting arm, has already been established in the ancient customs of medieval republics: Traditionally, the holding of a public office of trust was considered to ennoble a person and thus entitled him to use a coat-of-arms. This concerned elected officials, commissioned officers of the army amd navy, specialists appointed by the sayereign (which could be a Guild holding political power), and certain highly esteemed professionals, such as surgeons.

It must be kept in mind, however, that this category concerns not noble arms in the classical sense, but burgher, or patrician arms. It is a fallacy to think that these are "less in value" than "noble" arms. They are simply different and truly appropriate to a republic; especially, since it is debatable whether or not modern arms granted by an officer of a Monarch are still ennobling the one who pays the stipulated fee and "proves" descent from a former subject of this particular sovereign. The College of Arms in London, for instance, considers their grants of

arms to Americans as "honorary," and I seriously doubt whether they can thus

be judged "noble" according to the ancient Law of Arms.

In any case, arms granted to an American by a foreign heraldic authority—notwithstanding an exorbitantly high price paid for the prestige—have act ally considerably less protection than assumed arms that are copyrighted under U.S. law.

A further practical and simple avenue for the registration and protection of arms is given under other than English jurisdiction. This has to do with a person's identity, as expressed in his surname. Again, precedences for this have already been established in the republics on the continent. All we have to do is to treat a coat-of-arms the same as a surname, i.e. as personal property, protected in a court of law.

It should not present an unsurmountable obstacle to include into the Civil Code a paragraph that would consider a coat-of-arms and its use a "sign of a personality" and thus be regarded in law as one of the civil rights of a natural person, or even a corporation. At present, a person who is unjustly injured in his personal affairs may sue for the elimination of the interference. He should also be able to sue for his civil right, if he is contested in the bearing of his name, or—which is the same—in the use of his coat-of-arms, which identifies him. Once armorial bearings are legally equated with a surname, it ought to be easy for one who is injured because another one is usurping his shield, to sue for the abstention of such arrogance, and by proven guilt, for compensation.

This, however, would not fall under English Common Law, and would have to be considered a specifically U.S. legislation, because surnames actually do not exist legally in England. (Names there are subject to Canon Law, which stems from a time when people had first names only, and this has never been changed.)

Also, the time has come to formulate some specific guidelines for armigers and heraldic artists that are tailored to the situation in a sovereign republic. It might interest the reader what the Cantonal State-Archives of Zürich, Switzerland, published in 1946: Grundsätze der Wappenführung.

1. The arms of an extinct ramily shall not be appropriated and borne undiffer-

enced by anyone.

2. The coat-of-arms of a flourishing family shall be borne undifferenced only by this family. If the sphere of armigers entitled to a particular shield is not stipulated by tradition, the right to bear it must be proven incontestably.

3. A family bearing traditional arms, which are found to belong to another family, may continue to do so if it cannot justly be expected to discontinue them;

however, a distinct difference of the arms is recommended.

4. A family which cannot find a coat-of-arms belonging to it, has the right to a new creation. The new achievement shall be differenced in tinctures, metals and charges from the armorial bearings of families with the same surname, but not of the same tribe. The one who creates a new shield has the right to determine the sphere of its bearers.

5. A gentleman of the same tribe as an armigerous family, but according to these principles not entitled to bear its arms, may create similar arms. An under-

standing between the two families is desirable.

Moreover, I feel compelled to reiterate the urgent need for us to stipulate a standard by which new armorial creations should be judged, such as I enumerated in *The Augustan* of July-August 1971 (Vol. XIV, No. 4, "Breviarium Heraldicum") Before any arms be registered by a future heraldic authority duly empowered to do so by law, they ought to be measured against the 10 conditions set forth in that particular Breviarium mentioned. Without a standard, we may well copyright arms, but we will never successfully register them to be useful for the serious scholar.

All such practical approaches will be of no avail, of course, if the question of morality is neglected. Can you imagine a "heraldic mill" subscribing to such principles as those mentioned above? These are minimal conditions, and we have to insist that people involved with heraldry not only know what they are doing, that they are true professionals. We must expect more: the armigers as well as the artists, and the future functionaries needed to register, grant and protect U.S. arms, must display a strong dose of chivalric attitude. They must meet qualifications which make them behave in a truly ivilized manner and have absolute integrity of character.

I doubt very strongly that those business people now involved in the unethical practices of running "heraldic mills" will ever be brought to the point of such honorability just by friendly persuasion that they would voluntarily give up their deceptions. It is inherently impossible to deliver an outstanding product that de-

mands extraordinary knowledge, research, dedication, skill, and an enormous amount of diligent, painstaking, honest work for just two or three dollars. I do not deem it possible to make a compromise with the mail-order houses by educating them, because at the root of their commercial excesses is not their unfamiliarity with heraldry, but their intent to make a "fast buck" by their willingness to exploit the ignorance of their customers. True, creative heraldic art cannot be computerized.

Therefore, we need legislation by those States that are willing to assert their own sovereignty, which will outlaw the willful deception in heraldic matters. Even better, we ought to work for the acceptance of Federal heraldic responsibilities and standards by an independent institution responsible to Congress, like the Smithsonian, which doesn't need any special introduction or recommendation.

To arrange for a separate category in the present copyright procedures, comparable to the existing categories, which would enable every armiger to easily protect his assumption of arms, is a necessary first step—but it is not enough. Copyrighting arms is not tantamount to setting up a register that could be used by researchers. It is merely filing a claim to type of protection that is not automatic: any violation of a copyright has to be litigated in court by the copyright holder, at his own initiative and expense. The copyright office has neither the trained staff, nor the inclination to screen any blazon for accuracy and veracity, to watch out for heraldically incorrect emblazonment, duplication, or usurpation. This must to done by an independent, non-commercial clearing house with the power of the law behind it; especially, since heraldry encompasses not just family-arms, but also flags, business insignia, community-arms, seals, state- and similar emblems.

Association of American Publishers, Inc., Washington, D.C., October 6, 1975.

Hon. Robert W. Kastenmeier, Chairman, Subcompositive on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

Dear Congressman Kastenmeier: When I testified before your subcommittee on September 18, 1975 on the subject of proposed exemptions for the blind and the deaf, I said that this Association wished to make clear its belief that blind and deaf people are deserving of special consideration. At the same time, I informed the subcommittee that we would reserve our position on specific language until the amendments under consideration were more precisely identified.

I am now in receipt of a copy of a letter to you from the American Council of the Blind, dated October 2, 1975, which proposed a specific amendment to Sec-

tion 110(8). The language is as follows:

"(8) performance or the reading aloud (whether in person or by phonorecords) of books and other literary works, musical scores, instructional texts, specialized naterials and other printed matter in the course of a noncommercial broadcast service specifically designed or presented for blind or other handicapped persons (who are unable to read normal printed material as a result of such limitations) on any subsidiary radio carrier authority or cable transmission. Provisions of this subsection shall apply to noncommercial telecasts specifically designed for the aural handicapped."

We can fully support the language of this proposal, and we urge its adoption by the subcommittee.

Sincerely,

TOWNSEND HOOPES.

Weisman, Celler, Spett, Modlin & Werthheimer, Washington, D.C., December 24, 1975.

HERBERT FUCHS, Counsel, House Committee on the Judiciary, Rayburn House Office Buildiny, Washington, D.C.

DEAR HERB: Enclosed is a coppy of a let from Tom Brennan to Bernard Korman, General Counsel, ASCAP, dated December 18, 1975 concerning the GPO omission of one page from S. Rept. No. 94-473.

Also attached is a copy of the smitted page which, according to Tom Breinan, will be inserted in the Congressional Record when the Senate considers S. 22. Sincerely,

BENJAMIN L. ZELENKO.

Enclosures.

U.S. SENATE,

COMMITTEE ON THE JUDICIARY,

SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS,

Washington, D.C., December 18, 1975.

Hon. Bernard Korman, General Counsel, ASCAP, New York, N.Y.

DEAR MR. KORMAN: I have your letter of December 9 concerning the absence from Senate Report No. 94-473 of any discussion of clauses (5) through (8) of Section 110 of S. 22. Discussion of these clauses does appear in the official original copy of the report filed in the Senate by Senator McClellan. Because of an error in the Government Printing Office, one page of copy was not included in the printed report.

I am enclosing a xerox copy of the omitted page, showing the printer's marks. This commentary represents the interpretation of the Senate Committee on the Judiciary of clauses (5) through (8) of Section 110, and is part of the official

report on S. 22.

In order that the commentary on these clauses may be generally available, I anticipate that Senator McClellan will insert the omitted page in the Congressional Record at the time of Senate consideration of S. 22. I trust that this information is responsive to your inquiry.

Sincerely,

THOMAS C. BRENNAN, Chief Counsel.

Enclosure. ..

The provision also provides that if there is an admission charge the copyright owner may prevent a public performance of his work under this provision by serving a notice stating his objections at least seven days in advance.

Mere reception in public

Unlike the first four clauses of section 110, clause (5) is not to any extent a counterpart of the "for profit" limitation of the present statute. It applies to performances and displays of all types of works, and its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.

The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the

statute.

While this legislation has been under consideration in the Congress, the Federal courts have considered several issues relevant to this exemption in the context of the Copyright Act of 1909. This clause has nothing to do with cable television systems and is not intended to generally exempt performances or displays in commercial establishments for the benefit of customers or employees. Thus, this exemption would not apply where broadcasts are transmitted by means of loudspeakers or similar devices in such establishments as bus terminals, supermarkets, factories, and commercial offices, department and clothing stores, hotels, restaurants and quick-service food shops of the type involved in Twentieth Century Music Corp. v. Aiken. The exemption would also be denied in any case where the audience is charged directly to see or hear the transmission.

Agricultural fairs

Clause (6) provides that the performance of a nondramatic musical work or of a sound recording in the course of an annual agricultural or norticultural fair or exhibition conducted by a Government body or a nonprofit organization is not an infringement of copyright. This exemption extends to all activities on the premises of such fairs or exhibitions.

Retail sale of phonorecords

Clause (7) provides that the performance of a nondramatic musical work or of a sound recording by a retail establishment open to the public at large without any direct or indirect admission charge where the sole purpose of the performance is to promote the retail sale of the work is not an infringement of copyright. This exemption applies only if the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring.

Handicapped audience

Clause (8) was not included in the bill passed by the Senate in 1974. It has been added to facilitate the special services provided by various noncommercial radio and television stations to a print or aural handicapped audience. It provides that it is not an infringement of copyright to perform a literary work in the course of broadcasts "specifically designed" for a print or aural handicapped audience.

UNITED STATES POSTAL SERVICE,
LAW DEPARTMENT,
Washington, D.C., November 11, 1975.

Hon. Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This refers to H.R. 2223, the proposed general revision

of the Copyright Law, now pending before your Committee.

Section 8 of present title 17, United States Code, provides (in part) as follows: "No copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof, except that the United States Postal Service may secure copyright on behalf of the United States in the whole or any part of the publications authorized by section 405 of title 39."

Section 105 of the proposed revision would replace present section 8 with the

following:

"Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding c pyrights transferred to it by assignment, bequest, or otherwise."

It may be seen that proposed section 105 would not reenact the postal proviso now contained in section 8. We understand that the intent of this omission is to

repeal the postal clause.

Our records indicate that the clause in the present statute relating to postal authority with respect to publications under 39 U.S.C. § 405 was first omitted from the successive copyright revision bills after a representative of the former Post Office Department indicated informally in December, 1964, that he did not believe it was of further use. The Postal Service has reconsidered this question in the light of present needs and has concluded that the postal proviso is of value to us and to the public. Accordingly, we are writing to recommend that this postal statute not be repealed, but be returned to its original place in 39 U.S.C. § 405, from whose predecessor it was transferred when placed in its present position in 17 U.S.C. § 8.

This provision of law was first drafted and included in legislation devoted only to postage stamp designs. It was proposed by the Administration in 1937; was considered and approved without substantial revision by the postal committees of the Congress; and was enacted together with present 39 U.S.C. § 405 in the first section of the Act of January 27, 1938 (hereinafter the "1938 Act"), c. 10, 52 Stat. 6. The remainder of the 1938 Act amended the criminal statutes

Section 1 of the 1938 Act states:

"That the Postmaster General shall prepare, in such form and at such times as he shall deem advisable, and, upon his request, the Public Printer shall print as a public document to be sold by the Superintendent of Documents, illustrations in black and white of postage stamps of the United States, together with such descriptive historical, and philatelic information with regard to such stamps as the Postmaster General may deem suitable: Provided, That notwithstanding the provisions of section 52 of the Act of January 12, 1895 (U.S.C.,

dealing with reproduction of postage stamp designs, including the limited exemptions from those statutes, now contained, as further amended, in 18 U.S.C. § 504 (1970). Section 1 of the Act originally was placed in its entirety in 39 U.S.C. § 371 (1934 ed., Supp. V, 1939) by the editors of the United States Code, and remained there until the final proviso was transferred to 17 U.S.C. § 8, when title 17 was enacted as positive law in 1947. Act of July 30, 1947, c. 391, 61 Stat. 669. Neither that nor subsequent changes in the statute have been intended to accomplish substantive changes. H.R. Rep. No. 254, 80th Cong., 1st Sess. 1 (1947); Pub. L. No. 87-646, § 21, 76 Stat. 446 (1962); S. Rept. No. 1875, 87th Cong., 2d Sess. 2 (1962); Postal Reorganization Act, § 6(i), 84 Stat. 777 (1970); H.R. Rep. No. 1104, 91st Cong., 2d Sess. 49 (1970).

In conferring with representatives of the Copyright Office with respect to this matter, we have delayed our presentation to the Committee in deference to their consideration of our recommendation, but have now been told that they prefer not to change the decision which was made in 1964 to recommend deletion of this provision from the copyright law revision bill. As we understand their view, it rests on the belief that the provision would be duplicative of the copyright authority which the Postal Service has exercised under the general provisions of title 17 since the Postal Service and the Copyright Office concluded that the provisions of the Postal Reorganization Act make the clause in 17 U.S.C. § 8 which prohibits copyright in works of the U.S. Government inapplicable to the reorganized Postal Service. Their belief rests on the opinion that although the meaning of the 1938 Act is unclear, it should be read as providing the former Post Office Department and the Postal Service a simple exemption from 17 U.S.C. § 8 for stamp catalogs published under 39 U.S.C. § 405, an exemption which would have been necessary to permit title 17 copyright in the catalogs for the Post Office Department but not for the Postal Service. This apparently was also the interpretation of the draftsmen of the original codification of title 17, although, as already stated, their action in removing the clause from title 39 has no legal effect on the provision's meaning.

Although we agree with the Copyright Office that the precise intention of the 1938 Act is not as clearly expressed as might be desired, we believe that the most sensible interpretation of the provision is that this postal statute did not intend to provide a title 17 copyright at all. It is illuminating that no Government agency had been permitted to obtain copyright under the Copyright Act before 1938, nor was any agency so authorized for the succeeding 29 years. Moreover, section 1 of the 1938 Act was part of an integrated plan enacted by Congress, on the advice of its postal committees, to regulate the use of nostage stamp designs, which did not amend the Copyright Act of 1909, and indeed which states that the authority it confers may be exercised notwithstanding anything to the con-

trary in the Copyright Act or any other law.

In our opinion, the 1938 Act assigned authority to the Post Office Department in the nature of a general proprietary right in its stamp designs in order to enable the Department administratively to issue licenses to permit controlled private uses of the designs, to the extent found appropriate, beyond the limited statutory authorization for certain general philatelic uses permitted by the 1938 Act's amendments to the otherwise prohibitive criminal statutes. The postage stamp designs to which this authority would extend, without reference to the Copyright Act, would be those illustrated in a publication to be issued by the Superintendent of Documents, at the request of the Postmaster General, officially cataloguing the postage stamps of the United States. In so acting, we believe that Congress, on the advice of the postal committees, relied on the authority of the postal power of the Constitution, art. I, § 8, cl. 7, which had long been understood to authorize federal postal monopolies, and the property power, and IV, § 3, cl. 2. The use of the term "copyright" in the 1938 Act in the sense of a general literary property prerogative rather than in the limited title 17 sense is not surprising, as the governmental prerogative it defines—which subsists in the whole or any part of a catalog of illustrations of previously sold postage stamps—is more analogous in many respects to common law "copyright" than to title 17

¹⁹³⁴ edition, title 34, sec. 58), stereotype or electrotype plates, or duplicates thereof, used in the publications authorized to be printed by this section shall not be sold on otherwise disposed of but shall remain the property of the United States: And provided further, That notwithstanding the provisions of section 7 of the Copyright Act of March 4, 1909 (U.S.C., 1934 edition, title 17, sec. 7), or any other provision of law, copyright may be secured by the Postmaster General on behalf of the United States in the whole or any part of the publication authorized by this section."

218 U.S.C. §§ 8, 474 et seq., 501.

copyright, since the prior "publication" of the stamps had been limited—never dedicatory—because of the general prohibition of private use contained in the

criminal laws.

In reaching the foregoing conclusion, we were influenced by the fact that accepting the alternative interpretation that a title 17 copyright was intended would mean that section 1 of the 1938 Act was completely trivial from the moment it was enacted. It is clear that under the latter interpretation no authority of any practical use would have been conferred with respect to the postage stamp designs illustrated in the catalog. Applying the principles of the Copyright Act would have meant that the prior sale of the postage stamps themselves (which had been issued and sold for nearly a century without notice of copyright) would already have irretrievably dedicated to the public all rights in their design prior to each publication of the stamp catalog. It is equally clear that section 1 of the 1938 Act—like the rest of that Act—was intended to apply to postage stamp designs, not just to the supplementary textual matter printed in the catalog. The Government long had shown—and the other provisions of the 1938 Act had reaffirmed—a compelling governmental interest in controlling the private use of the designs on postage stamps, which have properties involving the credit and authority of the sovereign and are not simply at works. Prior to the 1938 Act the most that had been permitted for any private purpose was the copying of portions of stamp borders in philatelic publications in order to illustrate the distinctive margins; the pictorial designs could not be copied at all. Act of March 3, 1923, c. 218, 42 Stat. 1437. However, unlike the illustrations, the textual matter had appeared in the stamp catalog regularly since 1927 and was not distinctive in any way that could have justified an unprecedented exception from the rule against title 17 copyright in Government agency works. See U.S. Post Office Department. A Description of United States Postage Stamps and Postal Cards (1927) (variously titled thereafter). We cannot believe, nor do we think that a court could easily conclude, that the Post Office Department in proposing, the postal committees in approving, and the Congress in enacting this statute were so frivolous as to establish a unique departure from this time-honored principle for no intelligible legislative purpose whatsoever.

Interpreted in the manner we have suggested, section 1 of the 1938 Act is of present value to the Postal Service and the public and should not be deleted as superfluous. The Postal Service has received a number of requests from the public for authorization to make use of the designs of past postage stamp issues, including offers to pay reasonable royalties in accordance with general commercial practices. We have begun to accept these requests, and royalties which will be useful in paying part of the cost of producing these items (a cost otherwise assumed by purchasers of postage) are now being set aside for the Postal Service. Under the criminal statutes, stamp designs may be used only for certain limited purposes or as otherwise authorized in accordance with law. 18 U.S.C. § § 474, 504. Accordingly, the 1938 Act, as we read it, permits us to expand private access to the use of stamp designs under reasonable terms and conditions; it cannot be exer-

cised to make private access any narrower.3

In short, the Postal Service proviso of 17 U.S.C. § 8 is a postal law which was proposed for postal reasons by the Post Office Department and enacted by the Congress on the recommendation of the postal committees. None of the changes that have been made in this statute since its enactment in 1938—including its codification in title 17—have changed its substantive effect. The Postal Service considers this provision to be of present use to the Government and has received indication that members of the public wish to have the benefits it can provide. It would not seem reasonable for a general revision of title 17-simply to repeal this postal statute. While its precise meaning is not finally established, it would appear that any needed clarification is beyond the scope of the copyright revision and should come either from the courts or from further legislation arising in the postal committees which first adapted it. Accordingly, we recommend that H.R. 2223 neither repeal nor attempt to perfect the interpretation of this part of section 1 of the 1938 Act. Rather, we believe that the supplemental provisions of the bill should preserve the status quo by rejoining the provision, in substantially its original form and without substantive effect, with the rest of section 1 as pres-

of course, it provides a useful civil remedy, in place of criminal prosecution, against illegal uses of stamp designs.

ently codified in title 39.4 Treating the provision in this manner can do no harm even if it is eventually held to be superfluous. However, deleting it would foreclose what we believe will be shown to be a beneficial provision of law.

Sincerely,

W. ALLEN SANDERS, Assistant General Counsel.

THE COMMONWEALTH OF MASSACHUSEITS,
COMMUNITY ANTENNA TELEVISION COMMISSION,
Boston, November 6, 1975.

Hon. Robert W. Kastenmeier, Rayburn House Office Building, Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: Enclosed please find a copy of the statement of the Massachusetts Community Antenna Television Commission on copyright liability for cable systems. This statement sets forth the principles unanimously adopted by the Massachusetts Community Antenna Television Commission on October 2, 1975. It was presented to Senator Edward M. Kennedy for inclusion in the record of the hearings before the Senate Judiciary Committee which is considering new copyright legislation.

Very truly yours,

ANTHONY G. OETTINGER-Chairman.

Enclosure.

STATEMENT OF THE MASSACHUSETTS COMMUNITY ANTENNA TELEVISION COMMISSION

The Massachusetts Community Antenna Television Commission believes that the question of copyright liability for cable systems must be considered in conjunction with the current regulations of the Federal Communications Commission which govern cable television.

An approach should be taken which does not burden cable subscribers and cable operators with additional charges for the carriage and viewing of signals of local broadcast stations, but which recognizes the fairness of additional payments if greater viewing opportunities are provided through relaxed federal regulation.

If, however, the current stringent FCC cable rules remain in force, and greater viewing opportunities are not realized, then no copyright liability should be imposed. The cable subscriber should not pay additional fees if no additional benefits are derived.

To these ends, the Massachusetts CATV Commission proposes that the following principles be adopted in the enactment of copyright legislation.

No copyright fee should be required for the carriage of FCC mandatory local signals. If the cable operator must carry the signals of a broadcast station, the operator should not also be required to pay for carriage of the signals. Any copyright fee which is paid by a cable system operator would become a cost of operating the business which would be reflected in the rates charged to subscribers. A copyright fee for local signals levied on the cable operator would penalize and discriminate against the cable subscriber who, by necessity or choice, receives his or her local broadcast signals by means of a cable rather than by "rabbit ears," a rooftop antenna or even through a cable attached to a master antenna system serving an apartment complex.

The nonpayment of a copyright fee for loca Isignals would not be unfair to either broadcasters or copyright holders. The copyright holder whose work appears on a local UHF or VHF television station has been paid a fee based on the local distribution of the work. This fee is then reflected in the advertising

^{*}We suggest that section 105 of the supplementary provisions of the bill be amended by renumbering subsections (e) and (f) as (f) and (g), respectively, and inserting the following new subsection:

"(e) Section 405 of title 38 of the United States Code is amended to include the following

[&]quot;(e) Section 400 of title 88 of the United States Code is amended to include the following new subsection:

"(c) Notwithstanding the provisions of any other law, copyright may be secured by the Postal Service on behalf of the United States in the whole or any part of the publication authorized by this section."

rates of the television station and ultimately paid by the consumer (including the cable subscriber) as part of the price paid for an advertised product. Cable, rather than a detriment, is a benefit to both the broadcaster and the copyright holder. By providing clearer reception and in many instances greater local area distribution, the cable operator enhances the value of advertising on the local television station and, in turn the value of the copyrighted work.

Cable systems choosing to retransmit other than local signals should pay a copyright fee for distant programming imported. An exception should be provided, however, for a cable system operating in an area which has no real local signals and where all the signals carried are thus distant signals.

A copyright holder should receive a fee for the carriage of the copyrighted work on a distant cable system. It is not unfair for the cable subscriber to pay a fee for the reception of additional and more diverse programming; but if a fee is paid, the subscriber's viewing opportunities should not be limited by federal regulations. FCC rules currently restrict the distant signals which may be imported by a cable system. These limitations on distant signal importation should be removed.

Copyright payments should be related to the number of imported signals. For example, cable systems retransmitting four or less distant signals should be liable for minimal payments. Systems importing more than four signals should be charged a higher level of copyright payments. Such a scheme of payments would encourage the importation of distant signals to a point, and then encourage additional programming other than distant signals. It would also afford a modified protection for existing national broadcast patterns.

If distant signal importation restrictions are removed, however, a fair degree of protection should be afforded broadcast stations, who pay full copyright fees. A modified exclusivity should be adopted which would be limited to the right of first showing of any program which the station has purchased or which it receives from a network. After the first showing, a cable system should be

permitted to retransmit the program without further restriction.

When a cable operator pays full copyright fees for programming, the operator's usage of this programing should not be restricted by FCC rules, other than in exceptional circumstances. For example, all federal restrictions on pay cable's

showing of motion pictures should be immediately removed.

The premise underlying the principles set forth is that the cable subscriber should pay copyright fees only in exchange for greater viewing opportunities brought about by diminished federal regulation of cable television. If these federal regulations are not significantly relaxed, the Massachusetts CATV Commission urges that no copyright liability be imposed on cable television.

[Memorandum submitted by the Register of Copyrights]

THE EFFECT OF THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS ON THE COPYRIGHT REVISION BILL

(By Kent Dunlap, Attorney, Copyright Office)

I. THE CONCEPT OF THE SEPARATION OF POWERS

A. General theoretical basis

The theory of separation of powers, on which the Federal Constitution is based, is designed to divide the total power of government among autonomous organs, each one serving as a check on the powers of the others. Although this theory generally seeks to distinguish between law making, law enforcing, and law interpreting, there was purposely established an interrelationship between the legislative, executive, and judicial branches in order to augment the checks and balances theory of government. The Congress received the power to establish inferior courts, to scrutinize appropriations, and to approve certain Presidential appointments including nominations to the Supreme Court. The President was granted the power to veto legislation passed by Congress and appoint justices of the Supreme Court. The Judiciary secured the power to pass on Constitutional questions although much of this authority was derived after the adoption of the Constitution through case law.

Due to this intermingling of the functions of the three branches of government, it is clear that the principle of separation of powers was not meant to be an inexorable table of organization which would strangle the process of government, but rather, a practical demarcation of powers which would prevent any one department from acquiring absolute authority. Pro essors Jaffe and Nathanson

probably expressed this point best when they wrote:

"(I)t has always been recognized that each of the three organs of government shares its function in some degree with the others, the exact admixture differing widely from age to age. The Constitution itself mixes powers. The President participates in the formal legislative process. Madison wrote a classic paper in the Federalist defending the Constitution from the charge of impure mixtures of powers. He pointed to the English Constitution, which never knew a time when there was an absolute separation of powers.

"Beyond the formal constitutional arrangements our system has always involved each of the agencies in the work for which the others were typically responsible, the distribution of functions varying from era to era. A few examples illustrate the point. For many years the legislature—and only the legislature—granted divorces, a task now regarded as inherently judicial; the executive establishment made and still makes regulations for the enforcement of the tax system, adjudicated the incidence of tax, and levied jeopardy assessment; the judiciary issued price regulations and licensed liquor dispensers, a task now performed by executive or administrative agencies. And finally, the basic judicial process either by application of the common law or interpretation of statutes is, perhaps, as important an engine of law creation as any.

Along similar lines Chief Justice Howard Taft characterized the doctrine

of separation of powers in the following manner:

"Federal Constitution and State Constitutions of this country divide the governmental power into three branches... (I)n carrying out that constitutional division . . . it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to commonsense and the inherent necessities of the governmental co-ordination."

B. The constitutional basis of legislative power

Establishing the majority of the legislative powers of Congress is Article I, Section 8 of the Federal Constitution. Clause 8 of this Section empowers Congress to enact copyright legislaiton in the following manner:

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings

and Discoveries;"

4 Id. at 421.

In order to carry out the enumerated powers of Congress the last clause of Section 8 authorized Congress "to make all Laws which shall be necessary and proper for the carrying into execution the foregoing powers . . ." Interpreting the scope of this clause Chief Justice Marshall's classic opinion in *McCullock* v. Maryland held that it was within the discretion of the lawmakers to select any means reasonably adapted to effectuate their legislative duties. At the heart of that opinion he wrote the following language:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we thing the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with letter and spirit of the constitution, are constitutional."

In enacting legislation pursuant to its enumerated powers Congress may not, of course, encroach on the executive discrementary powers specifically granted

¹ Jan and Nathanson, Administrative Law, p. 3 (1968). ² J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928). ³ 17 U.S. 316 (1819).

to the President in Article II. The scope and nature of powers of administrators not specifically established by the Constitution, however, is a matter for determination by the Congress. This principle was established in the case of Kendall v. United States, ex. rel. Stokes, which involved Congressional supervision of an administrator located in the executive branch.

The facts of the Kendell case were relatively simple. The United States owed one Stokes money which the Postmaster General, Kendell, at Andrew Jackson's instigation, refused to pay. Taking his case before Congress, Stokes secured passage of a special statute ordering payment. Kendell, however, still proved noncompliant whereupon Stokes brought a mandamus action against the Postmaster.

The Supreme Court rejected the argument that administering the function of the Postal Service was solely the affair of the executive branch and, as a result, affirmed the issuance of the mandamus by the lower court. In its opinion the Supreme Court made it clear that when the powers of the executive branch come in conflict with an enactment of Congress, the legislation prevails unless it encroachs on one of the specifically enumerated powers of the President. In establishing this principle the opinion set out the following rule:

"The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the president. Such a principle, we apprehend, is not, and certainly cannot be claimed by the president. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president. And this is emphatically the case, where the duty enjoined is of a mere ministerial character."

C. SCOPE OF POWERS IN THE EXECUTIVE

While the President is granted general "executive power" by the opening clause of Article II, this power has been interpreted by the courts as having specific limitations. In discussing the executive powers of the President, the authoritative Congressional Research Service study breaks down the executive authority of the President in the following manner:

"The Constitution does not say that the President shall execute the laws, but that he shall take care that the laws be faithfully executed," i.e., by others who are commonly, but not always with strict accuracy, termed subordinates. What powers are implied from this duty? In this connection five categories of executive power shall be distinguished: first, there is the executive power which the Constitution confers directly upon the President by the opening clause of article II and, in more specific terms, by succeeding clauses of the same article; secondly, there is the sum total of the powers which acts of Congress at any particular time confer upon the President; thirdly, there is the sum total of discretionary powers which acts of Congress at any particular time confer upon heads of departments and other executive ('administrative') agencies of the National Government; fourthly, there is the power which stems from the duty to enforce the criminal statutes of the United States; finally there are so-called 'ministerial duties' which admit of no discretion as to the occasion or manner of their discharge." T

From this statement it can generally be seen that the executive power of the President stems from two sources-the enumerated Constitutional powers of the President and the executive powers created by legislation of Congress. As a result, to the extent that the President can trace an executive function to the enumerated powers under the Constitution, his authority cannot be made subservient to the will of another branch of government. Where an administrative function is created through legislation of Congress, however, the nature of that function is a matter for Congressional determination.8

³ 37 U.S. 524 (1838).
⁶ Id. at 610 (emphasis added).
⁷ The Constitution of the United States of America, Prepared by Congressional Research Service, Library of Congress, pp. 549–550.
⁸ Humphrey's Executor v. United States, 295 U.S. 602 (1935).

Establishing the Constitutional executive authority is Article II which begins: "The executive Power shall be vested in a President of the United States of Following this general opening clause are enumerated several specific executive duties, such as acting as Commander-in-Chief, making treaties, appointing ambassadors, enforcing the law, etc. Collectively, these enumeral powers have generally been characterized by some courts as vesting authority in the executive department over "purely political matters," leaving unaffected the roles traditionally assumed by the two other branches of government.

While the enumerated powers in Article II give the executive department wide powers, no specific executive functions are created in the patent and copyright areas. Therefore, as a general rule it would appear that Congress is under no obligation to create executive authority overseeing the administration of legislation in these areas. The one exception to this general rule would appear to be in the enforcement of criminal provisions since the law enforcement clause of Article II constitutionally mandates the prosecution of criminal offenses to the

·executive department.¹

D. The power of the Congress to create administrative agencies outside the executive department

Clearly the Congress has extensive power in determining the nature and scope of executive authority in administrative agencies. Once Congress decides, however, that an administrative agency should be established is it constitutionally

mandated that the agency be placed in the executive department?

The first modern case to discuss this issue, Myers v. United States, 11 appeared to answer this question in the affirmative. This case involved the effectiveness of an order of the Postmaster General, acting by direction of the President, to remove from office a first class postmaster in the face of an act of Congress requiring the removal to be confirmed by the Senate. Speaking for the majority of a divided court, Chief Justice Taft declared the statute to be an unconstitutional encroachment on executive discretion and thereby upheld the removal as valid.

While the opinion could have limited the case to removal of purely executive officials, the Court did not restrict itself to the immediate issue before it. The Court went on the announce that the President had inherent constitutional power of removal of officials who have "duties of a quasi-judicial character . . . whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control." This view of presidential power was deemed to flow from his constitutional duty of seeing that the laws be faithfully executed.¹⁸

The assertion that the executive department has inherent constitutional powers over all administrative agencies, no matter what the relation of the executive to the duties of the agency, was put to rest quickly in Humphrey's Executor v. United States. The material element of this case involved the removal by the President of Humphrey, a member of the Federal Trade Commission, in contravention of a federal statute which established a fixed term for Commissioners.

In due course Humphrey sued for salary.

Speaking for a unanimous Supreme Court, Justice Sutherland found in favor of Humphrey, thereby affirming the right of Congress to place the functioning of the FTC outside the executive department. The Court distinguished Myers on the ground that Myers involved a purely executive officer whereas the Federal Trade Commission was intended to be an independent agency exercising quazilegislative and quasi-judicial power. In setting out this distinction the Court made the following statement:

"The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute . . . Such a body cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave, and, in the contemplation of the statute, must be free from executive control . . . We think it plain under the

In these cases, the issue was raised whether certain executive actions were conclusive in determining disputes relating to property rights. In deciding in the negative, the courts held that property rights are to be determined by the judicial branch. Banco de Espana v. Federal Reserve Bank, 114 F. 2d 438 (2nd Cir. 1940); Smiths America Corp. v. Bendix Aviation Corp., 140 F. Supp. 46 (D.C. D.C. 1956).

10 Confiscation Cases, 74 U.S. 454 (1868); United States v. Cox, 342 F. 2d 167 (5th Cir. 1965).

11 272 U.S. 52 (1926).

12 Id. at 135.

13 Id. at 135.

14 295 U.S. 602 (1935).

Constitution that illimitable power of removal is not possessed by the President. in respect of officers of the character of those just named, (the Interstate, Commerce Commission, the Federal Trade Commission, the Court of Claims). The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to. forbid their removal except for cause in the meantime.

"The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute." is

Curtailment of executive authority over independent administrative agencies was not to end with the Humphrey decision. A remaining and unresolved issue was the question of whether the President, absent a provision expressly delimiting his autho: ty in the statute creating an agency endowed with quasi-judicial functions, remained competent to remove members serving thereon. To this query the Court supplied a negative answer in Wiener v. United States. 46 Emphasizing therein that the duties of the War Claims Commission were wholly adjudicatory and its determinations, final and exempt from review by any other official or judicial body, the Court unanimously concluded that inasmuch as the President was unable to supervise its activities, he lacked the power, independently of statutory authorization, to remove a commissioner serving thereon whose term expired with the life of that agency.

In reaffirming the Humphrey rationale, the Court characterize? the overriding

principle in the following manner:

"Humphrey's case was a cause cclebre—and not least in the halls of Congress. And what is the essence of the decision in Humphrey's case? It drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body to exercise its judgment without the leave or hindrance of any other official or any department of the government,' (295 U.S., at 625-26) . . . This sharp differentiation derives from the difference in functions between those whose tasks require absolute freedom from Executive interference." ¹⁷ In summary, it can be seen from this line of cases that administrative agencies which exercise executive functions as established by the Constitution. must be placed within the executive department of government due to the separation of powers concept. Administrative agencies which exercise quasi-legislative or quasi-judicial powers, on the other hand, may be pleced outside the executive department in order to assure their independence it carrying out their assigned duties.

II. THE FUNCTIONING OF THE COPYRIGHT OFFICE UNDER THE 1909 COPYRIGHT ACT

A. Nature of the authority of the Register of Copyrights

Primary among the responsibilities of the Register of Copyrights is maintaining a system of registration of claims to copyright in order to promote the orderly exploitation of intellectual property. A though registration with the Cop, right Office is not a prerequisite of obtaining copyright, registration must be made before an infringement action can be brought in federal court.18

The utility of any system of records is, of course, negated if the authority responsible for administering the system does not have discretion in maintaining the files' accuracy and uniformity. For this reason Congress explicitly established the authority of the Register of Copyright to determine whether the requirements of the Copyright Act have been met. Establishing the essence of the registration process is Section 11 of the Copyright Act which provides that any, person "may obtain registration of his claim to copyright by complying with the

¹⁸ Id. at 628-632. ¹⁰ 357 U.S. 349 (1958). ¹⁷ Id. at 353. ¹⁸ 17 U.S.C. § 13 (1974).

provisions of this title." In addition, Section 207 authorizes the Register of Copyrights to make rules and regulations to govern registration of claims to copyright and Section 209 establishes the content of the certificates of registration which are to be issued to persons "entitled" under the Act. In cases where the Register of Copyrights concluded that the requirements of the Copyright Act have not been met the decision is reviewable in a federal court through a mandamus proceeding.¹⁹

Under the provisions of the 1909 Copyright Act, the scope of the Register's discretionary authority essentially falls into two different areas. First, it must be ascertained whether a valid claim to copyright has been created, which includes an examination concerring copyrightability of the material deposited and a determination of compliance with the applicable formalities. Second, if a valid claim exists it must then be ascertained whether the proper materials have been

deposited.

While the Copyright Office does not search the prior art in order to determine copyrightability, as does the Patent Office in ascertaining patentability, in certain cases questions will arise over whether the requirements of the Act have been met. In cases where it is clear from the material deposited that the provisions in regard to securing a claim to copyright have not been satisfied, a refusal to register the claim will be made. If doubts are raised, however, over the underlying facts supporting a claim to copyright, attempts will be made to resolve the questions through inquiries to the remitter and reference to any pertinent material held within the Copyright Office. Such inquiries are particularly important in registering renewal claims since the original copyright registration bears directly on entitlement to claim the renewal right.

Despite the explicit language of the 1909 Act making the issuance of a certificate of registration contingent on meeting the requirements of the Act, occasionally legal theories have been advanced which would deny the Register of Copyrights the authority to refuse registration. These arguments have been so consistently rejected by the courts, however, that today arguments of so sweeping

a nature must be deemed frivolous.

The earliest decision concerning the right to refuse registration involved the Copyright Act of 1891 when the Librarian of Congress had the duties now performed by the Register of Copyrights. In *United States*, ex rel. Everson v. John Russell Young, Librarian of Congress, a mandamus action was brought against the Librarian for his refusal to record a claim to copyright in a book that contained no written material. The court sustained the Librarian's position, saying:

"I thir's it is very clear that this proposed publication which, as already stated, is only a book containing blank forms and does not contain a single English sentence—is not a composition of any sort—does not come within the purview of the copyright law, and that if a mandamus should issue requiring the Librarian of Congress to record it under the copyright law, that act would be of no advantage whatever to the applicant for this writ. Any court would adjudge that it was

not protected by the copyright law at all." 21

The first mandamus action to be brought against the Register under the 1909 Act was Bouve v. Twentieth Century Fox Film Corp., 22 involving the question of whether bound collections of page proofs of contributions to periodicals could be registered as a book. On this precise issue the Court held against the Register, finding that it was an abuse of discretion to refuse registration in the book classification. On the general issue of the discretionary powers of the Register, however, the Court of Appeals conceded that it seemed obvious "that the (Copyright) Act establishes a wide range of selection within which discretion must be exercised by the Register in determining what he has no power to accept." 28

Rendering a happier result for the Register was Brown Instrument Co. v. Warner.4 In this case the Register refused to enter a claim to copyright in a graphic chart used as a part of a machine on the ground that the nature of the work was controlled solely by mechanical or scientific calculations. In the mandamus action which ensued, the circuit court upheld the lower court in denying the petition stating that the plaintiff failed "to establish that its charts are

¹⁹ Vacheron Watches, Inc. v. Benrus Watch Co., 260 F. 2d 637 (2nd Cir. 1958).
26 Wash. L. Rep. 546 (Sup. Ct. D.C. 1898).
21 Id. at 547.
22 122 F. 2d 51 (D.C. Cir. 1941).

²³ Id. at 53. # 161 F. 2d 910 (D.C. Cir. 1947), cert. den. 382 U.S. 801 (1947).

'writings of an author' or 'drawings' within the meaning of the Constitution and the copyright statute." 25

The next mandamus action against the Register of Copyrights was the landmark case of Bailie and Fiddler v. Fisher.26 In this case the plaintiffs sought to compel registration, as a "work of art," of a claim to copyright in a picturerecord device. The work consisted of cardboard in the shape of a five pointed star with flaps on the lower two points, which, when folded back, provided a stand; in a circle on the face of the star was a picture of a Hollywood personality, and impressed over the picture was a phonograph recording of his voice. No argument was made as to the registrability of the claim on the basis of the photograph since the plaintiffs sought protection solely for the device itself. The Register's motion for summary judgment, on the ground that the device was not a "work of art" within the meaning of the Copyright Act, was sustained by both the district and circuit courts.

The last mandamus action brought against the Register involved both the manufacturing clause and the ad interim provisions. In Hoffenberg v. Kaminstein, an English-language edition of the book "Candy" was first published in France in 1958, probably due to the fact that the obscenity standards applicable at that time would not permit American publication. In 1964 those standards had liberalized sufficiently to permit publication of an American edition. In 1965 registrtaion was sought for both the French edition, under the ad interim provisions, and the American edition, without any statement of the new matter in the latter edition. Registration of both claims was denied by the Register. The French edition was not registrable under the ad interim provision because registration had not been made within the statutory six month period following first publication. Registration of the American edition was denied on the ground of a Copyright Office regulation which required books and periodicals first published abroad in the English language to comply with the ad interim provisions before domestic registration could be considered, unless the claim was limited to new matter.28

Subsequently, an action was brought against the Register to compel registration of the American edition. In both the district court and the circuit court the Register prevailed. In a per curiam opinion of the District of Columbia Court of Appeals it was pointed out that a regulation "is presumptively valid and ordinarily should be upheld unless it is inconsistent with the statute." The opinion went on to say that the regulation was consistent with the pertinent sections of the Copyright Act and that it accurately reflected the intent of Congress.

B. The functioning of the Copyright Office and the separation of power's concept While the Copyright Office is given significant administrative duties under the 1909 Act, it is by no means the only government agency having responsibilities in the copyright area. Enforcement of the criminal provisions of the Act are assigned to the Justice Department as is constitutionally required by the law enforcement clause of Article II.³⁰ In addition, the Justice Department represents the Copyright Office in court proceedings involving the Register which include compliance actions under Section 14 and mandamus petitions.

Another Executive Agency having considerable administrative responsibilities under the Copyright Act is the U.S. Customs Service of the Treasury Department. Section 106 of the Act prohibits the importation of materials bearing a false notice of copyright or works which are pirated editions and Section 107 establishes importation prohibitions against works not complying with the manufacturing requirements. Enforcement of these provisions is the responsibility of the

Customs Service. From this sketch of governmental responsibilities under the Copyright Act it is apparent that there is a mixture of authority which is similar in fashion to the interrelationship between the three branches of government under the Constitution. Under such a copyright system no one agency can determine government policy in all areas of copyright matters thereby establishing a checks and balances system tending to mitigate against arbitrary action.

In enforcing its assigned duties under the 1909 Act the Copyright Office must

²³ Id. at 911.
25 258 F. 2d 425 (D.C. Cir. 1958).
366 F. 2d 684 (D.C. Cir. 1968).
37 C.F.R. § 202.4(b) (1967).
48 Hoffenberg, supra note 27 at 685.
49 17 U.S.C. § 104 (1974).

occasionally work closely with the Executive Departments of Justice and Treasury. Being administratively located within the Library of Congress, however, it is clear that the Copyright Office can not be thought of as being part of the executive branch which, to some, might raise the question of whether such a

placement is constitutionally permissible.

In order to analyze this important issue two related questions will be examined. First, the narrow question will be discussed of whether an agency exercising the powers of the Register of Copyrights must be placed in the Executive Department. Second, if the answer to the first question is no, a broader inquiry will be made whether there are any constitutional principles which would prohibit Congress from placing the Copyright Office within the Library of Congress.

1. Must an agency exercising the powers of the Register of Copyrights be placed within the Executive Department?

In order to answer this question it is clear that the Mycrs-Humphrcy-Wiener line of cases establish the applicable principles. In administering its responsibilities it is clear that the Copyright Office performs a quasi-judicial function. In determining registrability of claims to copyright the Register is to apply the standards established by statute and a certificate of registration serves as prima facie evidence of the facts stated therein. Moreover, decisions of the Register are directly reviewable by the federal courts through mandamus petitions.

In exercising his discretion it is clear that the Register is to exercise independent judgment, ultimately relying on the law itself to determine decisions in individual cases. In situations where the law is ambiguous, it would clearly be proper for either Members of Congress or governmental officials from the Executive Branch to offer opinions as to the proper practice. In situations where the law is clear, however, it would certainly be improper for any official to instruct

the Register of Copyright to perform in a way contrary to statute.

Having established that the Copyright Office is an independent ogency exercising quasi-judicial functions it is clear that the first question is governed by the Wiener case. Since the Register of Copyright exercises no executive functions established by Article II of the Constitution, the Copyright Office does not have to be seen within the Executive Department.

2. Z. ... rany constitutional principles which would prohibit the Congress from congress?

It is clear from the *Humphrey-Wiener* decisions that only Executive functions precisely enumerated in Article II of the Constitution are required to be located in the Executive branch. In this way the application of the separation of powers concept as it relates to Executive powers is limited to those powers specifically set out in the Constitution. Clearly, if the separation of powers doctrine has been limited in a similar fashion over all aspects of constitutional jurisprudence, then there can be no objections to placing the Co. That Office within the Library of Congress since the functioning of such an agency has not been assigned to any

of the three branches of government.
One of the clearest Supreme Court decisions in setting out the theoretical basis of the separation of powers concept was Williams v. United States, which discussed extensively the power of Congress to establish judicial power outside the scope of Article III of the Constitution. The facts of this case are relatively simple. The plaintiff, a judge of the Court of Claims of the United States, had grown comfortably accustomed to receiving his yearly salary of \$12,500. When the Comptroller General reduced his compensation to \$10,000 per annum, the judge objected on the ground that Section 1 of Article III forbad such action. The Comptroller defended the reduction on the ground that the Court of Claims was a "legislative court" and hence outside the judicial power as established by Article III.

Citing a long line of cases establishing that territorial courts were properly considered "legislative courts" and therefore outside the provisions of Article III, the Supreme Court concluded that a similar characterization must be made of the functioning of the Court of Claims. Once having determined that the judicial power of the Court of Claims was outside the scope of Article III, it

^{**} Bouvé, supra note 22. ** 17 U.S.C. 209 (1974). ** 289 U.S. 553 (1932).

naturally followed that the provision of that Article forbidding a reduction in

compensation was inapplicable.34

In reaching its decision on the objections raised by the plaintiff, Mr. Justice Sutherland dealt in a precise fashion with the concept of separation of powers. While acknowledging the significance of the doctrine, the Judge clearly limited its application to those powers "definitely assigned by the Constitution." In establishing this standard Mr. Justice Sutherland used the following language,

"The view under discussion—that Congress having consented that the United States may be sued, the judicial power defined in Art. III at once attaches to the court authorized to hear and determine the suits—must, then, we rejected, for the further reason, or, perhaps, what comes to the same reason differently stated, that it cannot be reconciled with the limitation fundamentally implicit in the constitutional separation of the powers, namely, that a power definitely assigned by the Constitution to one department can neither be surrendered nor delegated by that department, nor vested by statute in another department or agency. . . And since Congress, whenever it thinks proper, undoubtedly may, without infringing the Constitution, confer upon an executive officer or administrative board, or an existing or specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the Urited States, it follows indubitably that such power in whatever guise or by whatever agency exercised, is no part of the judicial power vested in the constitutional courts by the third article. That is to say, power which may be devolved, at the will of Congress, upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers:" 35

Applying the standards advanced by Mr. Justice Sutherland, it is clear that the quasi-judicial powers of the Copyright Office regarding administration of the registration system have not been "definitely assigned to any department under the Constitution." Therefore, the doctrine of separation of powers is not applicable and the quasi-judicial power of the Copyright Office "may be devolved, at the will of Congress, upon any of the three departments."

As a result of the limited application of the separation of powers doctrine, as firmly established by the Supreme Court precedents, coupled with the century old tradition of administering the registration system of copyrights within the Library of Congress, of it is clear that constitutional objections to the placement of the Copyright Office are without foundation.

TIL THE IMPACT OF THE SEPARATION OF POWERS CONCEPT ON COPYRIGHT REVISION

Presently before Congress is a Copyright Revisi. Bill which, if passed, will completely replace the outdated 1909 Act. Like the copyright law presently in effect, the Revision Bill would divide the administration of the copyright law among several governmental authorities. The Executive Department would have essentially the same functions as under the present law, i.e. enforcement of the criminal and importation provisions. The Copyright Office would continue its administrative responsibilities of registering claims to copyright but with several significant modifications. In addition, the Register of Copyrights would have a new responsibility in constituting the Copyright Royalty Tribunal, a new governmental authority designed to review periodically compulsory licensing rates and to resolve disputes invilving distribution of royalty fees.

From this sketch of the division of governmental authority under the Revision Bill it is clear that the new law would retain the advantages of the 1909 Act

^{**}Mark the court of Claims was to be considered an Article III court. None of the seven judges participating in the decision, however, advocated changing the Williams approach regarding the separation of powers concept. Thus, the tradition of limiting the application of the doctrine to those nowers specifically articulated in each Article remained unimpaired by the subsequent modification of the status of the Court of Claims.

**SWIlliams, supra, note 33, p. 581-581 (emphasis added).

**Congress originally designated the Library of Congress as responsible for the administration of the registration system in the Copyright Act of 1870, 16 Stat. 212. In the 1909 Act which subsequently followed, the Register of Copyrights was substituted for the Librarian of Congress as the official primarily responsible for the administration of the copyright system. The Copyright Office, however, remained within the structure of the Library of Congress, During this century-long period, no constitutional questions were ever raised over in proper location of these administrative functions.

**S. 22, 94th Congress, 1st sess. (1975); H.R. 2223, 94th Congress, 1ct sess. (1975).

in mitigating against arbitrary governmental action by mixing power among several agencies. However, due to the modification of the functioning of the Copyright Office, coupled with the creation of the Copyright Royalty Tribunal, a new analysis must be made regarding the impact of the separation of powers concept on these two entities.

A. The functioning of the registration system by the Copyright Office

Under the Copyright Revision Bill deposit of copies and registration of claims to copyright would be treated as separate though closely related requirements. Deposit of published material for the Library of Congress would remain mandatory with the Register of Copyrights authorized to demand compliance. Registration of a claim to copyright, on the other hand, would be permissive although registration would generally remain a prerequisite to bringing an infringement suit in federal court. In cases where the Register has refused registration, however, the copyright claimant would be entitled to institute an infringement action, provided the Register was notified of the complaint. 10 Since the refusal to register would no longer serve as an absolute bar to federal court, the need for a mandamus action would be eliminated.

Despite these significant changes in the deposit and registration provisions, it is clear that essentially the functioning of the Copyright Office in administering the registration system would remain the same as under the present law. In determining the registrability of a claim the Register would ascertain that "the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met. . . ." 1 The certificate of registration is to be accorded prima facie evidence of the facts stated therein as long as registration is made within five years after first publication.42 Where registration occurs after that time, the probative value of the certificate would be subject to judicial discretion. Finally, the Register of Copyrights would be authorized to establish regulations to assist in the carrying out of his responsibilities.43

From the nature of these provisions it is clear that the maintenance of the registration system would remain a quasi-judicial function. Determination of registrability of a claim is purely a legal question and a refusal to register is reviewable in federal court by instituting an infringement action with notification of the action to the Register. Since Wiener clearly established that agencies performing quasi-judicial functions need not be placed in the Executive Department, no change in the location of the Copyright Office would be required by passage of the Revision Bill with respect to the registration system.

B. The Copyright Royalty Tribunal

Under the present Revision Bill, a Copyright Royalty Tribunal would be established in the Library of Congress for the dual purpose of adjusting the compulsory licensing royalty rates and settling disputes concerning distribution of royalty fees deposited with the Register of Copyrights (except for the mechanical reproduction of music). In order to establish the membership of the Tribunal, the Register would ask the American Arbitration Association or a similar successor organization to furnish a list of three potential arbitrators. The Register would then communicate the proposed names to all known parties of interest who would be permitted to submit written objections to any or all of the proposed names. If no objections were received, or if the Register determined that the objections were not well founded, he would certify the appointment of the three arbitrators. If the Register decided that the objections were well founded, on the other hand, he would request the American Arbitration Association to propose the necessary number of substitute individuals.44

In order to discuss the constitutional issues associated with the establishment of the Copyrigit Royalty Tribunal, it is necessary to analyze the nature of the Tribunal's functioning in its two areas of responsibility—royalty rate adjustment and dispute settlement over distribution of collected royalties.

³³ Section 407.
35 Sections 408 and 411.
40 Section 410.
41 Section 410.
42 Section 702.
44 Section 803.

1. Adjustment of royalty raies

In reviewing certain compulsory licensing royalty rates in order "to assure that such rates are reasonable," it is clear that the Copyright Royalty Tribunal performs a quasi-legislative function. Although administrative agencies performing such tasks are usually located in the Executive Department or are independent royalty agencies, it is clear from the Humphrey case that such placement within

the Executive Branch is not a constitutional requirement.

The power of Congress to delegate certain of its responsibilities has been established law since Chief Justice Marshall delivered the opinion of Wayman v. Southard,45 In that case the issue was raised whether it was an unconstitutional delegation of legislative power for Congress to authorize the Judicial branch to adopt rules of civil procedure. In answering in the negative, Marshall said that: "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."46

As to the proper bounds of the authority of Congress to delegate, the Chief Justice frankly noted: "the difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." 47

In addition to delegating legislative powers to both the Executive and Judicial branches, Congress has on occasion delegated quasi-legislative powers to independent regulatory agencies. The first such agency established under federal k.w appears to be the Interstate Commerce Commission whose rate making authority was affirmed as a constitutional delegation of power in Intermountain Rate Cases. A similar result was achieved in First National Bank v. Union Trust Co., involving the power of the Federal Reserve Board to authorize national banks to serve as trustees.

Finally, even delegation of quasi-legislative powers to private individuals has been upheld in certain cases. In St. Louis & Iron Mountain Ry. v. Taylor, the validity of a federal statute was affirmed which delegated to the American Railway Association the authority of determining the standard height of draw bars for freight cars and to certify the figure to the Interstate Commerce Commission which was required to accept it. Similarly, a federal statute providing that restrictions upon the marketing of tobacco become operative only upon a favorable vote by a prescribed majority of those persons affected was upheld in Currin v. Wallace."

From these Supreme Court precedents it is clear that there are no general constitutional prohibitions preventing Congress from delegating quasi-legislative power to whomever it chooses. Naturally, not all delegations of legislative power will be constitutional. The test, however, it not based on the nature of the legal authority receiving the power, (whether the authority is in the legislative, executive, or judicial branches, or whether it is an independent agency or private individual), but rather, whether the legislative power has been delegated "under a limitation of a prescribed standard." 52

In ascertaining whether the Ednimum "standards" as required by the Constitution have been met, Chief Justice Taft established the following guideline: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." 33 Judging from the fact that the Supreme Court has declared only two acts of Congress unconstitutional for failing to meet this test, however, it is clear that standards of a very general nature have frequently been upheld." Thus, passing the "intelligible principle" test have been such general formulations as "just and reasonable," " "public

^{49 23} U.S. 1 (1825).

^{## 23} U.S. 1 (1825).
Id. at 41.
Id. at 42.
234 U.S. 476 (1918).
234 U.S. 476 (1916).
210 U.S. 281 (1908).
306 U.S. 1 (1939).
United States v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 281 U.S. 311, 324 (1931).
United States v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 281 U.S. 311, 324 (1931).
The Constitution of the United States, 276 U.S. 394, 409 (1928).
The Constitution of the United States of America, Prepared by the Congressional Research Service, Library of Congress, p. 69 (1973).
Tagg Bros. & Moorhead v. United States, 287 U.S. 420 (1930).

interest," "" "public convenience, interest, or necessit. "" "unfair methods of competition," and "excessive profits."

Comparing the standards establishing the bounds of authority of the Copyright Royalty Tribunal in adjusting the royalty rates with standards in other federal statutes which have been declared constitutional, there appears to be no question that the delegation of rate-making authority to the Tribunal is well within the constitutional powers of Congress. Established as the general standard in determining rate adjustment is the test of "reasonableness." This standard, standing alone, was held to be constitutionally sufficient in Tagg Bros. & Morehead v. United States.

Providing even more significant guidance to the Copyright Royalty Tribunal than the general reasonableness standard, however, is the fact that Congress will initially set the compulsory licensing fee. Such a clear Congressional indication as to the nature of a "reasonable rate" is unusual in statutes delegating rate-

making power and may provide some guidance for the Tribunal.

Finally, if the rate is adjusted by the Tribunal it will not take effect until 90 days after the rate change has been reported to both Houses of Congress. If either House of Congress adopts a resolution during this 90 day waiting period stating that it does not favor the adjustment, the change will thereby become ineffective. This procedure of Congressional review before an adjustment can take place was patterned after several federal statutes such as the Reorganization Act of 1939, and the Postal Revenue and Federal Salary Act of 1967. Through this method it is assured that the findings utilized by the Copyright Royalty Tribunal will be directly scrutinized by Congress before the adjustments become effective.

In summary, there are no constitutional problems over delegating to any agency such as the Copyright Royalty Tribunal the quasi-legislative power of reviewing statutory licensing fees in order to insure reasonableness. There are no authorities requiring such an agency to be placed in the Executive Department and the standards establishing the bounds of the Tribunal's discretion are clearly within the Supreme Court precedents.

(2) Settling disputes over distribution of compulsory licensing royalties collected by the Register of Copyright

Under the Revision Bill as it is presently constituted, the Register of Copyrights would collect the compulsory licensing fees from cable transmission of broadcast programs and the performance of musical compositions by juke box operators. If the Register determines that no controversy exists over the distribution of the royalties, the money collected will be divided among the claimants. If a controversy does exists, however, the Register will constitute the Copyright Royalty Tribunal to arbitrate the dispute. **

In settling disputes between private parties over distribution of copyright royalties, the Copyright Royalty Tribunal performs a quasi-judicial function in much the same manner as the War Claims Commission settled war obligations in the Wiener case. Since Wiener established that such an agency need not be placed within the Executive Department, the locating of the Copyright Royalty Tribunal

within the Library of Congress raises no problems.

IV. CONCLUSION

In summary, it is clear that the framers of the Constitution embraced the separation of powers concept to prevent any one branch of government from acquiring complete dominance over all governmental affairs. The doctrine, however, was always intended to be flexibly applied so that the process of government could be efficiently carried out without pointless disputes over precise boundary lines of authority. Recognizing this fact, the Supreme Court has carefully limited the application of the separation of powers doctrine to those powers specifically enumerated in the Constitution. Any other result, would have greatly limited the

⁵⁶ New York Central Securities Corp. v. United States, 287 U.S. 12 (1932).
57 Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1938).
58 FTC v. Gratz, 258 U.S. 421 (1920).
59 Lichter v. United States, 334 U.S. 742 (1948).
50 280 U.S. 420 (1930).
51 Section 807.
52 53 Stat. 516 (1939).
53 Stat. 516 (1939).
54 Section 111.

Section 111. Section 116.

[∞] Sections 111, 116 and 801.

capacity of American government to forge new solutions to problems which never

could have been imagined by members of an eigtheenth century society.

If the Copyright Revision Bill ultimately secures passage in approximately the same form as is presently before Congress, a Copyright Royalty Tribunal would be created with independent, quasi-legislative and quasi-judicial powers to assist in the administration of a compulsory licensing system. Since compulsory licensing of copyrighted works was unknown to our founding fathers, it is not surprising that the Constitution fails to specify the location of an agency exercising the authority of the Tribunal. Under such circumstances, it is clearly within the authority of Congress to determine, within its own discretion, what placement of the Tribunal will best serve the public interest.

COPYRIGHT OFFICE,
THE LIBRARY OF CONGRESS,
Washington, D.C., September 22, 1975.

Hon. ROBERT KASTENMEIER, U.S. House of Representatives, Washington, D.C.



DEAR MR. KASTENMEIER: This is in reference to H.R. 7149, a bill to amend title 17 of the U.S. Code with respect to registration for unpublished works and to increase the fees of the Copyright Office, and for other purposes. You introduced H.R. 7149 on May 20, 1975 at the request of the Librarian of Congress and the Copyright Office.

I am writing to urge separate enactment of this badly-needed measure as soon as possible, and apart from the bill to effect a general revision of the copyright law (H.R. 2223). It is, of course, true that H.R. 2223 is under active consideration, and that it incorporates all of the provisions of H.R. 7149. However, I believe that advance enactment of H.R. 7149 would greatly aid the Copyright Office in administration of the present statute and eventual implementation of the revised law.

As the Acting Librarian of Congress, John Lorenz, explained in his letter to Chairman Rodino requesting introduction of H.R. 7149, the last increase in the fees of the Copyright Office occurred in 1965. We are all too familiar with the inflationary spiral of the last decade. I share the philosophy that Copyright Office fees should never be so high as to discourage registration or to impose an economic burden on creative individuals. However, the ratio of expenses recovered by registration fees to costs has fallen so low (approximately 40 percent in fiscal 1975), that we have been compelled by economic realties to propose the increases set out in H.R. 7149.

I am confid at that the general revision bill will be enacted during the current Congress. This will it volve enormous changes in the copyright law and the copyright system, and as a practical matter the effective date of the omnibus legislation will need to be at least one year after enactment in order to plan and prepare for implementation of the law. Thus, assuming the revision bill is enacted next year, the fee schedule of the bill would not go into effect until approximately January 1, 1978. On the other hand, if H.R. 7149 could be enacted this year, and assuming it provides a six-month period for implementation, we would start receiving the additional fees by the middle of next year, at least 18 months before the effective date of the revision bill.

In addition to the new fee schedule, H.R. 7149 contains several other important proposals, which Mr. Lorenz discussed in his letter to Chairman Rodino. Among these are proposals to climinate the present barrier to unpublished registration for a large number of works, principally book material, and to permit a single registration for a group of contributions to periodicals by the same individual authors under specified conditions. These proposals in particular have the support of the Authors' League of America and I understand that enactment of H.R. 7149 is favored by the Authors' League because of these proposals.

Regarding the latter proposal, I call to your attention an inadvertent emission in the bill as submitted to you by the Library of Congress and the Copyright Office. On page 3, at line 23 of H.R. 7149 the word "individual" should be inserted between "same" and "author." A similar correction should be made on

page 4, at line 18.

A particularly important advantage of early enactment of H.R. 7149 would be the headstart it would give us in implementing some of the procedural changes called for by general revision. We are now registering well over 400,000 claims each year, and even minor changes in the formal processing of applications cause

major disruptions. We will need all the time we can reasonably expect to get to implement the revision bill, and early enactment of H.R. 7149 would help us a

good deal in this connection.

I therefore urge favorable consideration of H.R. 7149 as soon as possible. No one welcomes higher fees, but I believe there is general recognition of the need of a revised copyright fee schedule and the merit of the other proposals incorporated in the bill.

Yours sincerely,

BARBARA RINGER, Register of Copyrights.

THE AUTHORS LEAGUE OF AMERICA, INC., New York, N.Y., September 25, 1975.

Hon. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: The Authors League of America strongly urges immediate enactment of H.R. 7149, to change Copyright Office Fees and permit registration of unpublished literary works under the present law. These changes also are provided in the Copyright Revision Bill; but for the reasons indicated below, they should not be deferred until the Revision Bill is enacted and takes effect.

H.R. 7149 would increase the Copyright Office fees for registrations of original and renewal copyrights, assignments, searchers and other services. Needless to say, authors would prefer to pay \$6 instead of \$10 to register a copyright, \$4 in stead of \$6 to register a renewal copyright. However, the Copyright Office has described the economic conditions which compelled it to request these increases; and present policy requires it to look to its fees as one of its major sources of funding.

As the national society of professional writers and dramatists; the Authors League firmly supports H.R. 7149 because it eliminates a glaring inequity of the present Act which imposes a heavy financial penalty on authors who write works which are first published in periodicals and newspapers. During a 12 month period: a poet may have several poems published in various journals; several articles or short stories by the same author may appear in periodicals; or many cartoons or drawings by an artist may be published in a magazine or newspaper.

Under the present Coypright Act, the author, poet or cartoonist must file a separate copyright renewal application and pay a separate fee for each story, article, poem or cartoon; the same requirement applies to his registration of original copyrights. Thus, a poet must pay as much to register the renewal copyright in a one-page poem as a large motion picture company pays to register the renewal copyright in Gone With the Wind. The author of a five-page short story or article must pay as much to register its renewal copyright as a publisher pays to register the renewal copyright in a 1,000 page encylopedia.

Authors of poetry, and less, short stories and cartoons must write and publish several short works each year to earn a living. The requirement that the copyright and renewal copyright in each work be registered and paid for separately imposes a heavy and discriminatory burden on them. Frequently an author or his/her surviving family must spend large sums each year to register renewal copyrights in several short works. Over a pecriod of years, the cost of preserving renewal copyright protection may mount to hundreds of dollars. This cost cannot be escaped since some of these short works earn a significant portion of their modest income in the later part of an author's life through licenses to reprint them in anthologies and other collections. The author or family must renew copyright in all of them, to make sure that those that may be productive will be protected.

H.R. 7149 will rescue such authors from this onerous and discriminating burden. The Bill incorporates a reform suggested by the Authors League to the Copyright Office. Adopting this suggestion, the Bill prepared by the Copyright Office would permit an author of poems, articles, short stories and other periodical contril ons to group together several of his works published in the same 12 month peand register them at one time for a single fee. For example, six short poems originally published in periodicals during a 12-month period could be registered

for renewal at the same time for a \$6 fee, rather than \$36 in separate fees. More than one such group registration could be made in the same 12 month period.

This is a much-needed reform, and the Authors League is deeply greeful to Ms. Barbara Ringer, the Register of Copyrights, and Mr. John G. Locentz, the Acting Librarian of Congress, for incorporating and implementing it in H.R. 7149. It should be emphasized that even when the Revision Bill is passed, authors of then-existing copyrights will have to renew them; this means another 28 years of renewal.

The Bill makes another needed change in the present provisions. It would permit authors of books and other literary works to secure copyright by registration, prior to publication. Under the present law, these works can only be copyrighted by publication with notice of copyright—while composers, playwrights and other authors are permitted to secure copyright either by publication, or by registration of an unpublished work. There is no reason for this discrimination

and it ultimately would be cured by the Revision Bill.

As the Copyright Office makes clear, there are sound reasons for adopting H.R. 7149 now, rather than waiting for the enactment of the Revision Bill to accomplished changes in fees, group registrations of periodical contributions and registration of unpublished literary works. Even if passed sooner than anticipated, the Copyright Revision Bill could not take effect for at least a year thereafter, to give the Copyright Office time to prepare for administration of the new law. This means that authors of short stories, articles, poems and other periodical contributions would have to pay inordinately high registration fees, for renewal copyrights maturing during the next 18 to 24 months. There is no reason to prolong this inequity.

Consequently, the Authors League respectfully urges that your Subcommittee approve H.R. 7149, and recommend its immediate approval by the Judiciary Committee and its prompt enactment, this session, by the House of

Representatives.

Sincerely yours

IRWIN KARP, Counsel.

THE AUTHORS LEAGUE OF AMERICA, INC., New York, N.Y., September 3, 1975.

Hon. Robert Kastenmeter,
Chairman, Subcommittee on Courts, Civil Liberties and Administration of
Justice, Committee on the Judiciary, House of Representatives, Washington,
D.C.

DEAR CHAIRMAN KASTENMEIER: An Authors League member has called to our attention two ambiguities in Sections 203 and 304(c) of the Copyright Revision Bill. We believe these should be resolved by amplifying the Committee's report

and perhaps by minor language changes in the sections.

(i) Sections 203 and 304(c) are intended to permit authors and their heirs to terminate "long-term" transfers and licenses—i.e. those exceeding thirty-five years. However, the section might be interpreted to mean that unless the author or heirs followed the termination procedure, a license for a shorter-than-35-year-term would continue for the duration of the copyright. This, of course, was not the intention. But Sec. 204(b) (6) somewhat ambiguously states that unless termination is effected under the section, a grant—"if it does not provide otherwise"—continues for the duration of the copyright. We believe this language means—unless the grant specifies a shorter term. Nonetheless, the language could be read as requiring a specific provision in the grant stating that Subsection 6 does not apply. This would be a dangerous trap for authors, and would deprive most of the benefit of the section.

Given this possibility, the complexity of the entire section and the newness of its approach, some clarification is desirable. Therefore we urge that the Committee report eliminate doubts by adding a sentence explaining that Sections 203 and 304(c) do not extend any license or transfer made for a period of less than thirty-five years. We also suggest another sentence explaining that the phrase "if it does not provide otherwise", in Sec. 203(b) (6) and Sec. 304(c) (6) (F), means that the agreement does not provide for a term of less than thirty-five

years.

(ii) We also think it is essential that the Report stress that these two subsections do not change the rules of contract law which permit an author to terminate a license, transfer or assignment when the user fails to exploit the copyright or

exclusive rights transferred thereby. Indeed, we think it might be well to add language to Subsections 203(b) (5) and 304(c) (6) (E) making it clearer that such well-established rights of termination are among those preserved by these subsections.

Sincerely,

IRWIN KARP, Counsel.

NASHVILLE, TENN., October 28, 1975.

Hon. ROBERT W. KASTENMEIER, Chairman, Committee of Courts, Civil Liberties and Administration of Justice, Rayburn Building, Washington, D.O.

DEAR MR. KASTENMEIER: Last June I had the privilege of appearing before the House Subcommittee considering the revision of the Copyright Law to speak in support of the above sections proposed in amendments submitted by Senator Howard Baker and other Senators. These amendments were approved in the bill passed by the Senate in 1974. They were designed to grant libraries the right to archive television news programs and make them available for reference, research, and study.

Understanding that these amendments have again come to your attention in the hearings on the bill, I again express my hope that nothing will be done in the new Copyright Bill to prevent libraries and archives throughout the country from establishing audiovisual news collections just as, for many years, they have row

tinely kept print news collections.

While it is doubtless true that the expense of present technology itself now limits the number of audiovisual collections in libraries, this will not always be the case. Developments in technology where audiovisual material is concerned, similar to microfilm and microfiche for print materials, are taking place. These will make audiovisual news collections infinitely more practicable in the future

It is extremely fortunate that U.S. Copyright Laws have never prevented libraries around the country from collecting print news and making it available for reference, research, and study. Since the development of microfilm and microfiche these print news collections have proliferated, adding stature and significance to countless information sources throughout the nation. It can be expected that technological advances will make the same thing possible with respect to audiovisual news collections. For the law to prevent this from happening simply because audiovisual news has been initially circulated as image and sound rather than as printed matter would be an error, especially as the fact is unquestioned that today the most heavily relied upon news is that which comes to the public via the audiovisual medium.

At the moment there is only one television news archive in the nation whose collection systematically covers all three commercial networks. This is the Television News Archive at Vanderbilt University in Nashville, Tennessee. While many persons are not yet really aware of its existence, the Vanderbilt Television News Archive, begun in 1968, is already a matter of lively interest and use throughout the country. The scope and depth of this interest and use is evident from the enclosed information: (1) a listing of uses in a recent two-day period; (2) a report on uses of the collection since 1971.

Along with many others I believe it would be wrong for the Copyright Law to prevent the making of such collections and/or making them accessible to the academic sector and the public as a whole.

I hope the amendments will be retained.

Yours truly,

PAUL C. SIMPSON.

INFORMATION INDUSTRY ASSOCIATION. Bethesda, Md., September 9, 1975.

Hon. ROBERT W. KASTENMEIER, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Rayburn House Office Building, Washington, D.C.

DEAR BOB; Your continued efforts to obtain a resolution of outstanding differences in the copyright field are much appreciated. We welcome this opportunity to share with you our perceptions of the progress that has been made and the issues remaining.

You are aware of the efforts of the Copyright Conference and its Working Group. While efforts of the Working Group to define in practical terms the boundaries of systematic copying were fruitless, a good faith effort was made. The fact that the library community intended to seek exemptions for library photocopying in this revision cycle quickly emerged. Efforts to pin down a definition of "systematic" run counter to such exemptions and were eventually abandoned in favor of detailed and productive consideration of alternative payments mechanisms. The parties to these latter discussions found them extremely useful in coming to a better understanding of each other's problems, methods of operation, and points of view. The impending study of inter-library loan transactions and payments mechanisms is based on the fuller mutual understandings derived from these discussions. In effect, however, the working group agreed to disagree on how or even whether, "systematic" copying should be defined.

We believe the bill's language distinguishing between isolated and unrelated photocopying by individuals as "fair use" and "systematic" photocopying as an infringing activity is an absolutely essential ingredient in the revision bill. We urge that it be retained in the form in which it passed the Senate in the last

Congress.

A recent development involving the British Library Lending Division and the Center for Research Libraries exemplifies the alternative that faces libraries and publishers in its absence. It also raises questions with regard to the consist-

ency between § 108 and § 602.

The enclosed copies of Newsletters (attachments A and B) issued this past spring and summer by the Center for Research Libraries embody the details of the "systematic" approach the CRL is taking to inter-library photocopying practices. All the elements of the republishing business are to be found in this arrangement: (1) a source of supply, (2) a membership arrangement by which these services are paid for, (3) detailed arrangements for identifying user needs and in obtaining fulfillment copies, and (4) alternative networks for ordering (by mail, Telex and Tymnet network). The logical extension and stated objective of this effort is to "discover whether there is not a large number of journals for which one copy could adequately serve U.S., British and Canadian users." (at-

tachment C).

At an Engineering Foundation Conference held in August, 1975 a British Library Lending Division (BLLD) official described in detail the operations of BLLD. This represents the furthest advance in the application of information technology and business administration to republishing via photocopying. No copyrig' ermissions are sought. It is a "mail order" operation. Conveyor belts connect photocopying units with mail room facilities. No reading room facilities are provided; it exists almost solely to distribute copies made from its holdings. It has found that it is cheaper to photocopy a journal article than to lend the original. Savings in subscription costs and in storage and processing charges result. The number of photocopies made increased from 13,000 in 1963 to 900,000 in 1974 from 7% to 60% of total "loans". The machine operations involve strategically located Rank-Xerox machines throughout the library placing operators close to the stacks. Speed of service is emphasized. Lank-Xerox Copyflo machines are used, but only it the morning. (It is cheaper, but somewhat slower). After lunch all orders are processed on Rank-Xerox machines to facilitate their being mailed that day. The U.S. National Library of Medicine obtains 5,000 items per year from BLLD. The arrangement with the Center for Research Libraries is expected to generate about 200 requests per day or, based on 200 days per year, 40,000 requests per year. The orders depend on a system of prepayment. A book of 20 order forms is sold for 15 British pounds. The order forms or coupons have a value equal to a 10 page article returned by air mail (see attachments D and E). Multiple coupons are needed for articles exceeding 10 pages.

If libraries are granted photocopying exemptions this is the kind of massive republishing various libraries and library consortia will undertake. CRL is already gearing up to perform this function nationally. Copyright will become meaningless and all published material will essentially fall into the public domain under this library republishing pressure. The economic basis for creating and maintaining the channels through which ideas are formalized and distributed will be destroyed. The objective of one copy of a journal adequately serving U.S., British and Canadian users may have initial economic attraction

for libraries, but since, in the long run, it will eliminate all but government subsidized journals, it is not consistent with the purposes of copyright or the concept

of freedom of the press in this country.

The Copyright Conference study of inter-library loans and payments mechanism has significance at this point. The publisher group is not opposed to photocopying in inter-library loan transactions. It was interested primarily in assuring a continued basis for economically viable publishing efforts. The study seeks to evaluate a system to provide such a basis under copyright.

The advent of this overseas photocopying service raises the question whether the provisions of § 602 are consistent with the "systematic" language of § 108. If, for argument, it is conceded that the business operations of the British Library Lending Division are "systematic" in nature and are specifically covered by the language of § 108(a) does the language of § 602(a) (3) exempt the distribution of confects II Suggestion PLLD? tribution of copies to U.S. users by BLLD?

There appears to be a loophole in the law when these two sections are read

together. It appears that § 602(a) (3) exempts foreign libraries who engage in the kind of "systematic" photocopying specifically covered by § 108(g).

The saving clause, § 602(b) only prohibits importation and apparently denies the copyright owner other remedies. Since BLLD returns photocopies of articles by air mail, the practical problems involved in identifying infringing works as

they enter the U.S. renders this provision meaningless.

We believe this loophole should be closed: § 602(a) (3) should be amended to make it consistent with § 108(g); and § 602(b) should be amended to provide the copyright owner his full range of remedies against imported infringing

works.

One philosophic note in this bicentennial year. The Statute of Queen Anne is often cited as the source of our copyright law. This is true but in a reverse sort of way. While the Statute of Queen Anne laid the ground work for a crowncopyright, our forefathers reversed the process by granting copyright to authors, rather than to the government to avoid government control and to assure a free press mechanism. The erosion of private copyright represented by efforts to exempt library photocopying attacks this very basic and historic fact on which our sophisticated, and delicately balanced system of freedom of expression depends.

We strongly support the distinctions drawn between isolated and unrelated reproduction and distributing, on the one hand, and systematic reproduction or distribution, on the other, as a sound basis for facilitating the application of information technologies and for maintaining the economic viability of the entire information distribution system in the U.S. so essential to the promotion of

science and the useful arts.

Thank you for your efforts in this area. Sincerely,

PAUL G. ZURKOWSKI.

[From Special Issue, July 25, 1975]

CENTER FOR RESEARCH LIBRARIES TO FILL LOAN REQUESTS FOR ALL CURRENT JOUR-NALS IN SCIENCE, TECHNOLOGY, AND SOCIAL SCIENCES

At its annual meeting on 14 April, the Center's Council voted unanimously to have the Center increase its journals project to include the coverage of all currently published journals in science, technology, and the social sciences. The increased coverage will become effective July 1, 1975. Complete details about coverage and procedures for requesting journal articles will be issued to all member libraries later, but well in advance of the beginning date of July 1. In the meantime, following is a general outline of the program.

1. Member libraries may request from the Center articles from any journal in science, technology, and the social sciences with an imprint date of (probably) 1965 or later. The precise beginning date has not yet been determined:

1965 or later. The precise beginning date has not yet been determined.

2. Most requests will probably be filled in the form of free photocopies of the articles requested. Some, at least initially, will be filled by loan from the Center

of the full issue containing the article requested.

3. Requests may be sent to the Center, as now, by mail, or by collect telephone or teletype. But, the Center will encourage teletype for all requests. A special teletype format for the listing of bibliographic details, name of borrowing institution, etc., is being devised. This format is not anticipated to require any more bibliographic or verification information than interlibrary loan librarians now normally supply. Rather, it will be concerned primarily with the order and placement of the elements. This format will be imposed in order to minimize the need for re-keying those requests that will be re-transmitted to Boston Spa.

4. The Center will begin its own subscriptions to those journals most frequently requested on interlibrary loan by the members, and will also begin to acquire such backfiles as are available and affordable. All requests the Center cannot fill from its own collection will be forwarded immediately via teletype to the British Library Lending Division in Boston Spa. The BLLD will fill such requests with a photocopy sent via air mail directly to the member library.

Member libraries can normally expect to receive photocopies of requests the Center forwards to the BLLD within 5 to 12 days after they have sent their

request to the Center.

5. Interlibrary loan librarians will not be expected to check a catalog or list of titles to confirm that the journal from which an article is wanted is in fact available from the Center. Indeed they will be encouraged not to so check, but instead to request any journal they believe to be classifiable as science, technology, or social science published after the beginning date announced by the project. The chances of the needed title being available are expected at least to equal, and more probably to be better than, the average rate of success libraries are now having in getting their requests filled on the first try, even with the checking they now do.

The expanded comprehensive coverage offered under this new program is expected to benefit the members in two ways. First by giving them simpler and faster access on interlibrary loan to more materials they cannot immediately supply from their own collection. Second by giving them more freedom and flexibility in allocating their acquisitions expenditures for journals to improve

service and accessibility.

[From Newsletter, June 18, 1975]

To: CRI, members.

Subject: Guidelines for access to Journals in Science, Technology, and Social Science.

Ι

Following are initial guidelines for CRL's expanded Journals Access Service (JAS), to begin July 1975. A detailed description of the required forms to be followed in submitting requests will be sent to all members within the next

couple of weeks.

Based on the Center's past experience it had been anticipated that the member's use of this new and greatly expanded journals access service would begin at a relatively low level and gradually increase from that. However, the response we have received from the first announcement of this program indicates that there is a greater pent-up need for this improved service, and a greater readiness by ILL librarians to use it, than was expected. In order to insure that the Center is not so swamped during the initial period of this project that service slows and everyone is disappointed, the Center is immediately taking two steps.

First, we have already begun to establish procedures for automated formating and transmission of requests to the British Library Lending Division (BLLD), using the TYMSHARE computer network. This is delaying the start of service

by a couple of weeks. We had not expected that the volume of requests would make this economically justifiable until perhaps the second year of the service and that it would be implemented later. The network channel is already in operation, and the BLLD is already connected into it. CRL's procedures and format program are already partially developed and presenting no problem. However, it may be another two to three weeks before the system will be fully operational.

it may be another two to three weeks before the system will be fully operational. For this reason the Center will not be ready to accept requests for articles under this service until mid-July. As soon as possible we will send an announcement to all members giving a precise date for beginning the service. (Requests for journals and other materials from the Center's own collection may of course continue as at present.)

Second, in order to try to insure that the initial volume of requests does not flood the Center, with consequent delays in service, the initial limits of coverage

will be as follows:

A. The service will be limited only to full members and associate members offering the Ph.D degree in two or more fields. These are the only member institutions that are yet actually paying an increased membership-fee to support

this service.

B. Eligible member libraries (see A) may request from the Center articles from any journal in science, technology, and the social sciences with an imprint date of 1970 or later, with the exception of articles appearing in journals dealing primarily with clinical medicine. Clinical medicine is defined as being addressed primarily to the practice of medicine on humans, or to research on medical problems of humans. In general all journals with titles of medical specialties (e.g., urology, enterology, optholmology, surgery, etc.) are regarded as medical titles. Journals in fields basic to medical practice we regard as not being clinical medicine if the field is taught in departments outside medical schools (e.g., psychology, psychiatry, pharmacology, botany, mycology, parasitism, bacteriology, public health, etc.).

C. Requests should be submitted only to fill requests for the library's own students and faculty. Requests should not be submitted to fill the needs of research-

ers and other institutions.

D. Requests should be submitted to fill current research needs. Requests should not be made for photocopies needed merely to fill in missing pages from journals neld by the library unless those pages are needed for current research by a student or faculty member.

II. FOR MORE INFORMATION

As mentioned above, detailed information on JAS format and request procedures will be sent to you shortly. The Center's staff is devoting a good deal of time to developing this program and we are optimistic that by mid-July we will have an efficient and rapid means of filling your needs for journal articles in the fields of science, technology (except medicine) and the social sciences published from 1970 forward.

The Center will have a suite in the St. Francis Hotel in San Francisco during the ALA Conference. You will have to ask the Information Desk at the St. Francis for the number of the suite. It will be listed under the name of Ray Boylan. We will have CRL staff members there ready to discuss JAS and any other aspects of the Center's operation during the following hours:

other aspects of the Center's operation during the following hours:
Sunday, June 29, 2:30 P.M. to 8:00 P.M.; Monday, June 30, 9:00 A.M. to 7:00 P.M.; Tuesday, July 1, 9:00 A.M. to 7:00 P.M.; and Wednesday, July 2, 9:00 A.M.

to 7:00 P.M.

The staff members who will be in San Francisco are Esther Smith, Acquisitions Librarian, Susan Levy, Circulation Librarian and Ray Boylan, Assistant

Director.

If you would like to have meetings in the suite with one or more of these people either during the hours above or afterwards, contact Ray Boylan at the St. Francis. We would especially welcome meetings with librarians from several institutions working at similar jobs to discuss their experiences in using the Center. Remember that in asking for the suite nur ber, it will be in the name of Ray Boylan. If you are in San Francisco and ha e a few spare minutes, drop by if only to say hello.

CENTER FOR RESEARCH LIBRARIES TO ESTABLISH U.S. NATIONAL LENDING LIBRARY FOR JOURNALS 1

The availability to our users of backup copies of original documents abstracted by BIOSIS is a concern of long standing. The following announcement promises hope for obtaining copies of primary journal articles which at present are difficult to locate. It is reprinted, with permission of the publisher, as it appeared

in Information.

"With the help of a five year, \$450,000 grant, from the Carnegie Corporation, the Center for Research Libraries (CRL) has undertaken an expanded acquisitions program for currently published journals. This program is planned as the first step toward the establishment of a comprehensive national lending library system for journals. With some additional support CRL could add 6000 titles over a five-year period to bring the total number of journal subscriptions to about 13,000 titles. It is not expected that CRL will be the only lending library in such an ultimately comprehensive system; included as integral elements would be the National Library of Medicine and probably several other national institutions.

"Simultaneous with the expansion of its own journal holdings, CRL will make available to its member institutions selected journals from the holdings of the National Lending Library for Science and Technology (NLL), Boston Spa, England. This arrangement with NLL will enable CRL immediately to provide its members with access to several thousand more journals than it has funds to subscribe to now. It will, at the same time, serve as an experiment designed to discover whether there is not a large number of journals for which one copy could adequately serve U.S., British, and Canadian users. Titles frequently requested from the list established for borrowing from NLL through CRL will

be acquired.

"CRL is a cooperative 'libraries' library,' whose operating income is provided by annual fees from its member libraries. Founded in 1949 by ten major universities, CRL now has over 100 full and associate members, primarily major universities but including college, public, special, and governmental libraries. Journals to be included in the project will be suggested by member libraries. CRL will acquire both titles to which members are cancelling subscriptions and newly begun titles in which members are interested. Titles in all fields will be included except those in medicine and agriculture. The majority of subscriptions will be for titles published outside the U.S., Canada, and Great Britain. Contact: CRL, 5721 S. Cottage Grove Ave., Chicago, IL 60637."

THE BRITISH LIBRARY LENDING DIVISION

OVERSEAS PHOTOCOPYING SERVICE (OUTSIDE EUROPE)

The British Library Lending Division now takes more than 45,000 periodicals, and has one of the largest collections of recently published literature in the world, covering science, technology, the social sciences and the humanities.

To facilitate the use of the library's photocopying service for articles in periodicals, reports and extracts from books, and, in order to give a quick service, it is necessary for orders to be prepaid. This is by means of coupons which can be purchased from us in books of 20. These must be sent attached to request forms which will be supplied free. The value of the coupons is set out in the table shown later in this pamphlet.

For each photocopy required, copies B and C of a request form, specifying what is wanted and where it is to be sent, together with the required number of coupons should be sent to us. A separate request is required for each item.

If the document is available the copy will be dispatched as quickly as possible, probably within 36 hours of the request being received. If too many coupons are sent, the surplus ones will be returned with the order. If we cannot supply the photocopy we will either pass the request on to another large library in the UK which is thought to have the document, or ret. the form and replacement coupons to the sender.

Copies will be sent outside Europe by air mail.

¹ Reprinted from Information. Part 1. News—Sources—Profiles, Vol. 5(2): 66-67, 1973. Publisher: Science Associates/International, Inc., 23 East 26th Street, New York, N.Y. 10010.

Table 5

REVENUE AND EXPENSE ITEMS FOR ALL TV STATIONS REPORTING, 1974.

(In Thousands of Dollars)

<u> </u>	SCHEDULE 1. BROADCAST REVENUES						
LINE NO.	CLASS OF BROADCAST REVENUES	MAKE ENTRIES IN THIS COLUMN FIRST (omit cents)	USE THIS COLUMN FOR YOUR TOTAL- ING ONLY (omit cents) (c)				
<u> </u>			S				
1 2 3	A. REVENUES FROM THE SALE OF STATION TIME: (1) Network Sale of station time to networks: Sale of station time to major networks, ABC, CBS, MBS,	\$ 245,024	• •				
1 1	NBC (before line or service charges)	247,024					
5 6	Sale of station time to other networks (before line or service charges)	3,229	248,254				
7	(2) Non-network (after trade and special discounts but before cash discounts to advertisers and sponsors, and before commissions to agencies, representatives and brokers). Sale of station time to national and regional advertisers or						
8	Saje of station time to local advertusers or sponsors	1,329,216 979,357					
9 10 11	Total (lines 8 + 9)		2,308,573 2,556,827				
12	B. BROADCAST REVENUES OTHER THAN FROM SALE OF STATION TIME (after deduction for trade discounts but before cash discounts and before commissions): (1) Revenues from separate charges made for programs, materials, facilities, and services supplied to advertisers of sponsors in connection with sale of station time:	•	• .				
13	(a) to national and regional advertisers or sponsors 149:44	6,947	1				
14	(b) to local advertisers or sponsors	32,915	j				
15	(2) Other broadcast revenues	34,580	[
16	Total broadcast revenues, other than from time sales (lines 13 + 14 + 15)		74,442				
17 18	C. TOTAL BROADCAST REVENUES (lines 11 + 16)	401,020	2,631,268				
19	D. NET BROADCAST REVENUES (lines 17 minus line 18) 4		2,230,249				

- 1/ Includes \$61,744,260 from barter and trade-out transactions.
- 2/ Schedule 2 line 6 is included in Schedule 2 line 7.
- 3/ Total payroll is the sum of Schedule 2 lines 2, 6, 7, 17 and 21.
- 4/ Stations reporting less than \$25,000 in total revenues are not required to report items in Schedules 1 and 2 but are required to report in Schedule 3. Therefore, totals in Schedules 1 and 2 are somewhat lover than totals in Schedule 3.

NOTE: Last digits may not add to totals because of rounding.

Table 5 (cont.) (In Thousands of Dollars)

	SCHEDULE 2: BROADCAST EXPENS	ES .	
LINE NO.	CLASS OF BROADCAST EXPENSES	MAKE ENTRIES IN THIS COLUMN FIRST (omit cents)	YOUR TOTAL.
	(0)	(Ь)	(c) ·
1 2 3 4	TECHNICAL EXPENSES: Technical poyroll: All other technical expenses Total technical expenses	\$ 155,204 75,327	230,531
5 6 7 8 9 10 11 12 13 14	PROGRAM EXPENSES: Payroll* for employees considered "talent" (47:04). Payroll* for all other program employees (92:72). Rental and amortization of film and tape (73:40). Records and transcriptions (17:24). Cost of outside news services (32:29). Payments to talent other than reported in line (6) (19:40). Music license fees (41:40). Other performance and program rights (49:29). All other program expenses (57:04). Total program expenses	2/ 276,231 228,928 1,567 17,167 11,872 43,365 23,874 133,218	736.228
16 17 18 19 20 21	SELLING EXPENSES: Selling payroll*	108,129 109,234	217,364
21 22 22a 22b 23 24 25	Depreciation and amortization Interest Allocated costs of management from home office or affiliate(s) Other general and administrative expenses Total general and administrative expenses TOTAL BROADCAST EXPENSES (lines 4 + 15 + 19 + 24	111,605 39,736 57,359 233,522	533,466 1,717,589
*Payr	oll includes salaries, wages, bonuses and commissions. To	tal Payroll:	\$ 630,815

	SCHEDULE 3. BROADCAST INCOME		
LINE NO.		AMOUNT (omit cents)	1
1	Broadcast revenues (from Schedule 1, line 19)	\$ 2,230,297	1
2	Broadcast expenses (from Schodule 2, line 25)	1	1
3	Broadcast operating income . (loss) (line 1 minus line 2)	511,871	
4	Total of any amounts included in line 2 above which represent payments (salaries, commissions, management fees, (cats, etc.) for services or materials supplied by the owners or stockholders, or any close relative of such persons or any affiliated company under common control (see page 3 of instructions)	52,131	
5	Note: If no such payments were made, check here		

NATIONAL ASSOCIATION OF BROADCASTERS

COPYRIGHT PROPOSAL

Introduction

While we hesitate to come to the Subcommittee at this juncture with a new proposal for cable copyright liability, we believe the time is ripe for broadcasters to make known the present concerns of the industry with respect to copyright as it appears to have taken shape today.

For broadcasters the critical issue is not whether cable should be subject to copyright but rather, what kind of copyright liability will be applicable. A strong case can be made for normal copyright liability for all cable retransmission of broadcast signals, local and distant. Only this type of normal copyright liability would eliminate the unfair competitive advantage which cable now enjoys. Normal liability would not prevent cable growth; it certainly did not prevent television broadcasting from growing from virtually nothing a generation ago to what it is today.

We now have the Senate bill S. 22, in final form, as well as several other suggestions for changes in section 111, including a second proposal from the Teleprompter Corporation that seems to have cable industry support. Since the beginning of the consideration of copyright by the committee early last year, we have also had a number of changes in the rules and regulations of the Federal Communications Commission which affect cable and are pertinent to the copyright issue and to broadcasters. In addition the staff of the House Subcommittee on Communications has filed a study on cable which makes recommendations in the copyright area.

Taking all of these things into consideration, we believe the copyright situation has changed in some degree and that these changes require broadcasters to view the issues from new and different perspective. While our commitment to a settlement of the copyright issue has not waned, we believe that the new circumstances present an opportunity for a compromise proposal that has some distinct advantages over any other suggestions for section 111 yet made. On the fellowing pages we set out our proposal and the rational for it.

We want to emphasize that the proposal is viewed by broadcasters as a package, an integrated series of concepts with each part dependent on the other. We cannot say, nor would we want to imply, that any one part of the proposal could be accepted without the other parts.

We believe our suggestions have a number of advantages over anything that has gone before. Most significantly, it is a simple proposal and easily understood. There are no complicated formulas that, even if equitable, would prove expensive and difficut to administer. Local signals would be granted a compulsory license and small systems would be granted a total exemption for all signals presently carried. There would no 'onger be arguments over the tribunal or its periodic meetings. The Register (lopyrights would be relieved of a great deal of paperwork and administrative responsibilities. And the question of fees could be settled where it should be settled, not in the Congress, but among the parties themselves.

We urge the Subcommittee to give serious attention to the broadcast compromise proposal.

THE BASIC ELEMENTS OF SECTION 111 UNDER BROADCAST PROPOSAL

1. All Cable systems would be granted a compulsory license without any copyright payment for all local signals, now or in the future.

2. The spirit of the Senate proposal granting small cable systems a reduction in the fees to be paid would be retained and expanded. A compulsory license without any copyright fee would be granted for all present. FCC-authorized signals, distant and local, for cable systems with revenues of \$25,000 or less per quarter or \$100,000 or less per annum.

3. Normal Copyright liability would be imposed for all distant signals carried by large systems which do not qualif, for the small system exclusion, and for any additional distant signals authorized by the FCC in the future.

4. The language giving broadcasters the right to enforce copyright through appropriate infringement remedies would be qualified to conform with the Senate bill. Under S. 22 broadcaster court action would only come where the

violations are willful or repeated.

5. The bill would clearly state that no signal carried by a cable system could be changed or altered in any way by the cable operator unless required to do so by the non-duplication rules of the Federal Communications Commission.

A fuller explanation of each part of this package follows.

1. Exemption of local signals from any copyright payment

The ability to determine which broadcast signals carried by cable systems are "local" and which are "distant" is not a simple matter. In large part, past broadcaster opposition to exclusion of local signals from liability stemmed from this definitional problem.

In the spirit of compromise, however, and as part of the total package addressed in this memorandum, the industry is villing to accept the definition of local signals as those required to be retransmitted by FCC regulation which is the same definition used in the first Teleprompter proposal. While this definition may not be entirely correct, we believe the broadcast industry can accept the exclusion of such signals from copyright payment.

While these signals would be exempt from copyright payments, they should still be covered by a compulsory license so that any violations of the rules of car-

riage would be subject to appropriate infringement remedies.

2. Exemption for smaller cable systems

The Senate bill includes a provision added on the Senate floor which would have the effect of reducing cable liability for smaller cable systems. Under this amendment, those systems with under \$40,000 in revenues per quarter would have their actual revenues reduced for purposes of computing their copyright liability, though no system would pay less than \$30 per pear for their compulsory license. Under this amendment, systems with less than approximately 1,250 subscribers would receive the benefits of reduced copyright payments.

In the spirit of this provision, we propose that all cable systems with less than \$25,000 revenue per quarter or less than \$100,000 per annum, be granted a compulsory license without fee from all local signals and all distant signals presently authorized by the FCC. We believe this small business exemption is in the public interest and we estimate that this exemption would apply to half of the cable

systems in the country.

However, this compulsory license without fee payment should be given only for signals presently authorized by the FCC. Additional signals which might be authorized in the future should be subject to normal copyright liability, in keeping with the basic principle of fair competition between broadcasters and cable systems for copyrighted product. In addition, the compulsory license without fee should be available only to those systems that are unaffiliated with other, larger systems and are not directly or indirectly under common ownership or control with other systems. It should not be possible for a large cable system or a multiple system operator to escape appropriate liability by splitting up its operations into small systems. To allow this would contravene the spirit of this special small business treatment.

3. Normal copyright liability for distant signals

Once it is accepted that all local signals may be carried without copyright payment (and that all small cable systems will be exempt from payment of fees for carriage of presently authorized signals), then we believe it is most equitable to insist on normal copyright liability for all distant signals carried by non-exempt systems. By normal copyright liability we mean that the bill should establish the liability as it does now, but leave the amount of compensation to be determined by the parties involved. This would mean that this portion of the copyright question would be handled in a normal fashion, that is, in the marketplace where these negotiations's nould be carried out.

Negotiations could take place on a program-by-program basis, or it is entirely possible that some type of negotiating organization would develop along the

lines of ASCAP or BMI.

Imposing normal copyright liability for distant signals would help remove the current inequities in the cable-broadcasting relationship, and would give copyright holders a fair value for their product, instead of imposing a formula which would not adequately compensate them.

4. Right to sue for infringement

The House bill includes a provision in section 111 that would give the broadcaster a right to sue for infringement of copyright. We believe this House language could, as part of the overall package, be qualified by the language of the Senate bill allowing suit only where the violations are willful or repeated. Broadcasters have no desire to go into court unless the violations involved are serious ones that demonstrate disregard for FCC regulations. The costs of litigation would deter suits except in such cases. This provision is extremely important to the industry since it provide, us with a way to make certain that cable systems adhere to the retransmission rules of the Federal Communications Commission.

We have found in the past that FCC enforcement has little or no effect on violations by the cable industry. Even when the FCC has issued cease and desist orders compliance can only be assured by follow-up from the Justice-Department. The entire process is drawn out and ineffective and the right to sue is much needed by the industry to protect broadcast rights.

5. Full signal integrity

Recently the study by the staff of the House Communications Subcommittee suggested that cable systems could delete commercial film rights once copyright was agreed upon. Broadcasters find this suggestion one that could mean the destruction of our service as we know it today. We believe the Congress should make it clear that such unfair alteration of broadcast signals will not be tolerated.

For examples, under such a proposal a cable system could sell spot announcements on all the best programs that television has to offer, including the Super Bowl, the World Series, and dozens of other highly-viewed programs. This would have a serious impact on radio advertising and would, in effect, be putting cable interests in the broadcasting business as well as the cable business.

If cable wishes to act as a broadcaster, then there can be no excuse for cable being accorded any special copyright advantages such as compulsory license. Broadcast signals, when carried by a system, should be complete and unaltered.

SECTION III. LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS

(c) SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.-

- (1) Subject to the provisions of clause (2) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) in the following cases:
 - (A) Where the signals comprising the primary transmission are exclusively aural and the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission; or
 (B) Where the community of the cable systems is in whole or in part
 within the local service area of the primary transmitter; or

(C) When the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations or authorization of the Federal Communications Commission.

(C) Where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission as published in Volume 37, Federal Register, page \$252 et seq. on February 12, 1972, and the cable system is a small independent cable system.

(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, in the following cases:

(A) Where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations or authorizations

of the Federal Communications Commission; or

(B) Where the cable system, at least one month before the date of the secondary transmission, has not recorded the notice specified by subsection (d).

(3) Normal Copyright Liability.

(A) Any secondary transmission of a primary transmission not covered by the compulsory livense granted by clause (1) of this subsection, shall be actionable as an act of infringement under subsection (b) unless the cable system and the copyright holder agree on the retransmission of the primary transmission and have notified the Register of Copyrights of that agreement. Any such existing secondary transmissions of primary transmissions by a cable system as of the date of enactment will not be actionable as an act of infringement for six months following the date of enactment.

(b) Nothing in this Act shall permit a cable system to delete or alter any portion of any primary transmission unless required to do so by subpart F of part 76 of the regulations of the Federal Communications Commission.

of part 76 of the regulations of the Federal Communications Commission.
(d) COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall at least one month before the date of the secondary transmission or within 30 days after the enactment of this Act, whichever date is later, record in the Copyright Office, a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it together with the name and location of the primary transmitter, or primary transmitters, and thereafter, from time to time, such further information as the Register of Copyrights shall prescribe by regulation to carry out the purposes of this clause.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) or have been the subject of agreement with the copyright holder shall, during the months of January, April, July, and October, file with the Register of Copyrights, in accordance with requirements

that the Register shall prescribe by regulation-

(A) A statement of account, covering the three months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmission were further transmitted by the cable system, the names and addresses of other cable systems directly or indirectly in control of, controlled by, or under common control with the cable system fling the statement; the names and addresses of any other persons who directly or indirectly own or controlled; and the total number of subscribers to the cable system, and the gross amounts paid to the cable system irrespective of source and separate statements of the gross revenues paid to the cable system for advertising leased channels, and cable-casting for which a per-program or per-channel charge is made and by subscribers for the basic service of providing secondary transmissions of primary broadcast transmitters; and

(e) DEFINITIONS.—

As used in this section, the following terms and their variant forms mean the following:

A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or

display was first transmitted.

A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primar; transmission or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hayaii, or Puerto Rico: Provided, however, That a nonsimultaneous further transmission by a _ble_system located in a television market in Hawaii of a primary transmission shall be deemed to be a secondary transmission if such further transmission is necessary to enable the cable system to carry the full complement of signals allowed it under the rules and regulations of the Federal Communications Commission.

under the rules and regulations of the Federal Communications Commission.

A "cable system" is a facility, located in any State, Territory, Trust Territory or Possession that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission and makes secondary transmissions of such signals

or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(2)(B), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

The "local service area of a primary transmitter" comprises the area in which a television broadcast station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules and regulations of the Federal Communications Commission.

A. small independent cable system is a system with revenues of \$25,000 or less per quarter or \$100,000 or less per annum, and not directly or indirectly, by stock ownership or otherwise, under common ownership or control with any other cable system or systems.

NOTE.—(Since under this proposal the tribunal will have no jurisdiction over any fees involved, all references to section 111 should be stricken in Chapter 8.)

TELEVISION AFFILIATES ASSOCIATION, March 30, 1976.

HOP ROBERT W. KASTENMEIER,

Causeman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is written on behalf of the ABC TV Affiliates Association representing 185 television stations which are the primary affiliates of the ABC Television Network. We are very much concerned with the provisions of Section 111 of S. 22, a bill for the general revision of the Copyright Law, which is now before your Subcommittee. Section 111 is directed, as you know, to the cable television industry.

As you also know, the issue of copyright liability for cable television has been before the Congress, the courts, and the Federal Cc. mmunications Commission for a decade or more. During this period, the cable television industry has greatly expanded and greatly improved its financial condition. It is no longer characterized by small systems bringing additional broadcast television signals to underserved areas. It is now an industry being developed by major corporations in the large cities and, far from being a struggling infant, is showing substantial economic health and strength. Moreover, and this is most important, it has recently begun to develop as a pay cable service. From only a few thousand homes a year ago, pay cable now is in 600,000 homes. With increasing use of satellite interconnections, much greater growth is reliably forecast, with pay cable projected to reach over 6 million homes by 1980 and almost 15 million by 1985.

But for the subsidizing of cable by free television's programming, which costs the networks and stations hundreds of millions of dollars each year and for which cable makes no payment, the cable television and pay cable television industries would not exist.

We emphasize these current circumstances as the basis for urging that whatever may have been a fair copyright solution for the small "Mom and Pop" cable system is not an equitable copyright solution for the cable industry as it exists today—a major communications competitor, emphasizing, increasingly, pay television services. We do not believe that an industry of this proportion and character is entitled to the unprecedented subsidy privileges of a compulsory license with but token payments, as recently passed by the Senate in S. 22. We believe the time has come for the Congress to stop babying the industry and treat it in the same fashion as its competitors are being treated.

Under S. 22, the entire cable industry would pay approximately \$7-8 million annually in copyright fees. Under an alternative put forth by TeleProinpTer, this annual amount would be reduced to about \$2 million. Compare that to what the television industry is required to pay for its programming. A single showing of Poseidon Adventure" cost the ABC Television Network \$3.3 million. The amounts paid by other networks for "Godfather", "Gone With The Wind", and like premium programming equal or exceed the total amount which it is proposed to have the entire pay cable industry pay each year.

You would not seriously consider taxing broadcast corporations at 50 cents on the dollar and cable corporations at less than 1 cent on the dollar. But the economic disproportion of the current copyright proposals virtually amount to this. It would continue what is an essentially unfair competitive advantage.

We therefore have three specific proposals which we respectfully urge for your

First, an industry of these characteristics should be required to compete under normal and traditional copyright obligations. We see no reason why cable television should not be required to go into the marketplace and bargain and pay for all of its program product (including that appearing on television signals) just as television stations do. Any contrary course—exemptions based on size or the extraordinary privilege of compulsory licensing—dangerously interferes with and dramatically changes marketplace considerations. If cable wants to "compete" (as it so frequently claims) then Congress should let it compete—normallu.

Second, we recognize, however, that developments in the consideration of these problems over the past years may preclude enactment of full copyright liability legislation. We think it unfortunate if that is so. But if it is so, at the very least, the legislative solution should be fashioned in a more realistic manner than now contemplated. Specifically, the legislation should be drawn along lines recently elaborated upon by the National Association of Broadcasters, as

follows:

(1) All cable systems would be granted a compulsory license without any

copyright payment for all local signals, now or in the future.

(2) The spirit of the Senate proposal granting small cable systems a reduction in the fees to be paid would be retained and expanded. A compulsory license without any copyright fee would be granted for all present, FCC-authorized signals, distant and local, for cable systems with revenues of \$25,000 or less per quarter or \$100,000 or less per annum.

(3) Normal copyright liability would be imposed for all distant signals carried by large systems which do not qualify for the small system exclusion, and for

any additional distant signals authorized by the FCC in the future.

(4) The language giving broadcasters the right to enforce copyright through appropriate infringement remedies would be qualified to conform with the Senate bill. Under S. 22 broadcaster court action would only come where the violations are willful or repeated.

(5) The bill would clearly state that no signal carried by a cable system could be changed or altered in any way by the cable operator unless required to do so

by the FCC's non-duplication rules.

Third, the issues before you are not limited to copyright considerations alone. They are intimately associated with broader questions of communications policy and what you decide here will profoundly affect the future development of national telecommunications. For these reasons, we respectfully suggest that you consider referring Section 111 of this bill to the appropriate House committees for further consideration as part of a broader legislative scheme.

Thank you for your consideration of this letter.

Very truly yours,

Tom Goodgame, Chairman, Board of Governors ABC-TV Affiliaes
Association; Tom Goodgame, Vice President and General Manager KTUL-TV, Tulsa Okla.; John G. Conomikes, Vice President and Station Manager, WTAE-TV, Pittsburgh, Pa.; Eugene H. Bohi, General Manager WGHP-TV, High Point, N.C.; George U. Lyons, Vice President and General Manager WZZM-TV, Grand Rapids, Mich.; William F. Turner, Executive Vice President and General Manager KCAU-TV, Sioux City, Iowa; Jay Gardner, General Manager KRDO-TV, Colorado Springs, Colo.; Robert M. Bennett, Vice President and General Manager WCVB-TV, Needham, Maine; Walter M. Windsor, General Manager WFTV, Orlando, Fla.

The above named members of the ABC Affiliate Poard were present and voted unanimously to support this letter.

MEMORANDUM

(Received by the Subcommittee on April 13, 1976)

AGREEMENT BETWEEN NCTA AND MPAA AS TO TERMS OF COPYRIGHT LEGISLATION

1. Başis of liability

Cable systems will incur copyright liability by virtue of their retransmission of distant 1 non-network programing. The fee will be expressed as a percentage of

A distant signal is defined as one which is not required to be carried under present FCC

basic subscriber revenue for each imported equivalent signal. (In determining the number of "imported equivalent signals" independent and specialty stations will count at full value and national network and non-commercial educational station will count as ¼ of an equivalent signal.) The royalty rate agreed to is as

(i) .006 of basic subscriber revenues for the first imported equivalent signals; (ii) .00425 of basic subscriber revenues for each of the second, third and fourth imported equivalent signals; and

(iii) .002 of basic subscriber revenues for each imported equivalent signal in excess of four.2

All cable systems, whether or not they import distant signals, will pay .006 of their basic subscriber revenues for the privilege of being able to import distant signals, such percentage of revenues to be credited against the fee, if any, payable with respect to distant signals actually imported.

2. "Cherry Picking"

Each distant signal authorized by the FCC will be subject to the rate schedule regardless of the amount of that signal's programing which is actually carried by the subject cable systems; provided, however, that (i) distant programing substituted pursuant to the FCC's syndicated exclusivity ru., shall not be subject to the rate schedule; and (ii) distant signals carried on a part-time basis, where full-time carriage is not possible because of insufficient channel capacity, and distant signals carried pursuant to the FCC's late night programing rule, up to the number of distant signals carried during the regular broadcast day, shall be counted as a fraction of a signal equal to the percentage of their broadcast hours which are retransmitted.

3. Small system exemption

The Hathaway exemption will apply to small systems.

4. Definition of network signals

The definition for network signals will be based on the definition contained in Section 73.658 of the FCC's rules.

5. Changes in FCC exclusivity rules

Any change in the FCC exclusivity rules will enable the Tribunal to adjust the statutory royalty rates insofar as they relate to cable systems and signals affected by the change.

6. Changes in FCC rules governing the permissible number of imported signals

Any change in the FCC's rules which permit additional distant signals to be carried will enable the Tribunal to reconsider royalty rates applicable to (but only to) such additional signals. However, the original statutory rates are "grandfathered" in each of the following instances:

i) in the case of any signal presently carried;

(ii) in the case of any signal substituted for a signal presently carried, provided that the substituted signal is of the same "class" as the signal for which it is substituted;

(iii) in the case of any signal (whether or not now carried) which would be permitted to be carried by the FCC rules as now in force; and

(iv) in the case of any signal subsequently permitted to be carried because of an individual waiver of the FCC's existing rules.

7. Time for tribunal review

In the event of any of the regulatory changes referred to in paragraph 5 and 6 above, any party affected will have an immediate right to petition the Tribunal. Any rate change made by the Tribunal pursuant to such a petition may be reconsidered in the year 1980 and in each subsequent fifth calendar year.

8. Tribunal review of royally rates in light of changes in average basic subscriber

The Tribunal may also adjust statutory rates to reflect changes, in terms of constant dollars, in the average basic subscriber rate throughout the cable industry. The Tribunal may consider all factors relating to maintaining the real constant dollar copyright payment per subscriber and its relationship to the basic

² In applying the formula fractions of an imported signal equivalent will be counted at their fractional value.

³ All television signals are divided into four classes: (i) network signals, (ii) non-commercial educational signals, (iii) independent signals and (iv) specialty stations.

subscription rate structure. Those factors which affect or limit the change in basic subscription rates and which are beyond the control of the parties may be considered to be extenuating. Any rate adjustment pursuant to this provision may be made in 1980 or in any subsequent fifth calendar year.

9. Tribunal review limited

Except as specified in paragraphs 5 through 8 above, the statutory royalty rate shall not be adjusted.

10. Review of tribunal decisions

Tribunal decisions will be subjected to judicial, but not congressional, review.

11. Changes in FCC rules relating to commercial substitution and simultaneous retransmiss' n

No compulsory license will be extended to any cable system which deleies originally broadcast commercials or which retransmits broadcast programming on other than a simultaneous basis (except as permitted by the present FCC rules).

12. Private negotiations

The legislation will contain a provision allowing cable systems to negotiate privately with copyright owners for copyright rates below those established by, or pursuant to, the statute.

Each of the undersigned, authorized by his respective association, agrees to the foregoing and further agrees to use his best efforts to effect the speedy passage of legislation embodying all the terms of such agreement by both Houses of Congress.

NATIONAL CABLE TELEVISION ASSOCIATION INC.

ROBERT L. SCHMIDT,
President.

Motion Picture Association of America, Inc. Jack Valenti,

President.

Congress of the United States, House of Representatives, Washington, D.C., November 7, 1975.

Hon. Robert Kastenmeier, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: This is written to seek your support in connection with three matters now being considered by your subcommittee in connection with general copyright revision (H.R. 2223).

In brief, I hope you will support:

1. Reducing the mechanical royalty paid by record makers to the owners of music copyrights back to 2 cents where it belongs.

2. Including a performance royalty for those who create sound recordings.

3. Amending the bill to insure that state anti piracy laws are not inadvertently preempted.

Here is some background on each of these matters.

First, Section 115 of the general revision bill provides for a substantial increase in the mechanical royalties paid by record makers to the owners of music copyrights. This section increases the present rate from 2 cents per tune to 3 cents per tune, or 3 cent per minute of playing time, whichever is greater.

While this may sound like a modest change, it is not. In fact, the "penny" increase would result in added payments of nearly \$50 million a year to the copyright holders. This could result in higher retail costs for consumer buyers of recordings, to the tune of nearly \$100 million a year, if the increase were passed along through the distribution chain.

The recording industry feels that it cannot absorb such a substantial increase in payments. It would wipe out much of their profit, and could cause unemploy-

ment. Music copyright holders seem to be soing very well under the present 2-cent rate. Overall payments, and payments per tune, have more than doubled in the last 10 years. There appears to be no economic justification for the in crease established in Section 115.

To support this position, the recording industry has submitted full profit and

loss data. The music publishers, on the other hand, have not.

The public interest is being well served at the present rate. There is no monopoly on music, and musical compositions are readily available for recording. Those were Congress' objectives in establishing the compulsory licensing system and the 2-cent rate.

This position is supported by the Consumer Federation of America, the nation's largest consumer organization; the American Federation of Musicians; the American Federation of Television and Radio Artists; and the Recording Industry Association of America. Each of these organizations has communicated its views to the committee.

As you may know, the Senate Judiciary Committee voted to reduce the royalties set in the Senate bill back to the 21/2 cents, or 1/2 cent per minute of playing time. This is a step in the right direction.

My second request involves an omission from the general revision bill.

H.R. 2223 does not provide a performance royalty for those who create sound recordings. Simple equity says it should Mr. Danielson of California, and a number of our colleagues, have introduced separate legislation to provide for a performance right and royalty to the musicians, artists and record producers who create recordings (H.R. 5345).

A sound recording is the result of the cooperative efforts of artists, musicians, composers and the record producer. Under the 1909 copyright law, the publisher, composer is paid a performance royalty when a broadcaster plays a record containing the composer's tune. The rest of the creative team is paid nothing.

As the general revision bill now stands, the sound recording is the only copyrighted creative work for which a royalty will not be paid when it is performed by others for profit.

If sound recordings had been popular in 1909, this would not have happened.

This inequity should be changed by this Congress.

The performance royalty provision is advocated by the American Federation of Musicians, the AFL-CIO, the American Federation of Television and Radio Artists, the Council of Professional Employees, Actors' Equity, the National Endowment for the Arts, the Associated Council of the Arts, the Copyright Office, the Recording Induscry Association of America, and the Section on Patent, Trademark and Copyright Law of the American Bar Association.

My third point concerns the importance of amending Section 301(b) of the revision bill to insure that Congress does not inadvertently preempt the laws of 32 states, including Illinois, which now outlaw the piracy of sound recordings.

As you know, federal law protects sound recordings produced after February 15, 1972. Protection of recordings issued earlier is left to the states.

The Department of Justice has recommended such an amendment because of its concern that the present language could be misconstrued to preempt such state laws. This can be clarified by the inclusion of a new subsection (4) to Section 301(b), as follows:

'(4) Sound recordings fixed prior to February 15, 1972."

The Senate Judiciary Committee unanimously adopted this change.

My concern with these matters stems from the fact that Chicago is the base for many performing artists and working musicians, for whom recordings provide important employment opportunities. Chicago is also the home of one of our nation's major recording companies, Phonogram, Inc. The industry 's also important in other parts of Illinois. There are major recording manufacturing facilities downstate, and various recording facilities, record distribution centers and sales offices in the Chicago area, in addition to the Phonogram facilities Thank you for your consideration of these matters. If you would like further

information, please call me or Tim Morgan of my staff at 225-5736.

Sincerely,

MARTIN A. Russo, Member of Congress.

Congress of the United States, House of Representatives, Washington, D.C., October 28, 1975.

Hon. Thomas F. Railsback, Subcommittee on Courts, Civil Libertics, and the Administration of Justice, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR TOM: Mr. William E. Scarbrough, the Vice President and General Manager of WNYR/WEZO in Rochester, has written me of his concerns regarding measures which would result in payment of royalties to performing artists and record companies for air play of records by broadcasters.

Mr. Scarbrough's letter is a good one and I wonder if it could be made a part

of the Subcommittee's hearings on the subject.

Yery truly yours,

BARBER B CONABLE, Jr.

MALRITE OF NEW YORK, INC., Rochester, N.Y., October 20, 1975.

Hon. Barber Conable, Jr., Rayburn Building, Washington, D.C.

DEAR CONGRESSMAN CONABLE: Senator Hugh Scott and Representative George Danielson have introduced in the 94th Congress bills to require payment of royalties to performing artists and record companies for air play of records by broadcasters and other users.

I find it unbelievable that the Senate and House of Representatives would even consider such a measure, and let there be no mistake, we oppose such

legislation on the basis of principle as well as for financial reasons.

Artists, composers, musicians, etc. and record companies can attribute the enormous amounts of money paid for their services by the public to, first and foremost—RADIO! The radio industry daily spend, hours exposing their product to the masses and without charge to them. If there must be legislation, I suggest performers and record companies pay the broadcast industry! Talent and product without exposure have no value. Broadcasters are responsible for their success... we have in effect "made them"!

My personal experience over nineteen years in this business is that record companies spend very little money advertising their product. Of those monies spent, more by far is spent in print advertising than through the very medium that shapes the appeal of their product—RADIO! Why? Radio exposes the product FREE. Record companies beat a path to broadcaster's doors with new material, demonstrating its appeal, selling the broadcaster on the value and appeal of the artist. The performers send letters, make phone calls about their material and most of them are very friendly, *UNTIL* they become popular and are in such demand for appearances and concerts that they become untouchable, unreachable and inaccessible . . . unless there is a "buck" involved. The broadcaster accepts this as part of the process even though we know they were "made" by the industry.

While the broadcast industry continues to grow, radio's profit margin in particular has continued a downward side over the past ten years. Total radio industry revenues for 1973 are estimated at 1.5 billion dollars. The record industry, on the other hand, is growing much faster; its revenues soared by 49% during the 1968-73 period and were estimated by RIAA to have reached 2.017 billion dollars by 1973. We now pay rights fees for music used on our station to ASCAP, BMI, and SESAC. To require additional compensation to recording artists and record companies from the revenues of broadcasters cannot be justified and must not be legislated. Any assumption that all broadcast evenues are derived from a service of playing musical recording is totally exoneous. At WNYR and WEZO, large amounts of time are invested in programing ingredients such as news sports, public affairs, public service announcements, weather information, special programing features about our country, individuals, the local community and area, and we must invest substantially in strong on-air personalities who identify with our community and contribute substantially to generating revenues—yet this proposed legislation assumes that all our revenues come about because of music:

Adopting this principle would be an open invitation to any number of groups serving a function in the performance and recording of broadcast material to

seek royalty fees. With that principle once established, I find absolutely no comfort in the fact that the proposed legislation provides for a fee schedule that would be subject to review by an arbitration panel two years after enactment.

This is not a matter of legislation for a crumbling, broadbased, far-reaching industry that will "punish" the American people. This legislation will amount to legalized robbery, if enacted, and I strongly urge you to take a vigorous negative position on this preposterous record royalty legislation. Sincerely.

> WILLIAM E. SCARBROUGH, Vice President and General Manager, WNYR/WEZO.

> > OCTOBER 17, 1975.

Hon. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the Ad Hoc Committee on Copyright Law Revision, a group of 41 educational organizations interested in H.R. 2223, the Copyright Reform bill, I am pleased to forward to you the attached resolution adopted by the Committee on October 15, 1975.

We would welcome the opportunity to discuss the issues raised in our resolu-

tion with you or your staff.

Very truly yours.

SHELDON ELLIOT STEINBACH, Chairman, Ad Hoc Committee on Copyright Law Revision.

RESOLUTION ADOPTED BY THE AD HOC COMMITTEE ON OCTOBER 15, 19.5

The Ad Hoc Committee on Copyright Law Revision proposes to the Congress that H.R. 2223, the copyright law revision bill, and the accompanying report, should be amended as follows:

(1) There should be a limited educational exemption for non-profit educational and research purposes, as already submitted to the House Subcommittee.

(2) At the very least, the Ad Hoc Committee believes that the non-profit educational and scholarly community requires the following amendments and changes.

(a) The Committee's report on the bill should state that, so far as non-profit educational and scholarly uses are concerned, section 107 is not merely a statement of present law because it is the intent of the Congress that there be a different standard for non-commercial educational and scholarly uses under section 107 from the standard applied to commercial uses of such copyrighted materials. As the Register of Copyrights has recommended, the noncommercial character of non-profit educational and scholarly uses "should weigh heavily in fair use decisions." This legislative intention should be forcefully and clearly set forth in the Committee's report.

'A clearinghouse is not a proper requirement because it will ultimately

mean the destruction of fair use.

(b) In particular, the Committee's report should clearly indicate that-(i) section 107 authorizes multiple copies of excerpts and short whole works for non-profit educational and scholarly purposes, and

(ii) the bill rejects any distinction between face-to-face teaching and transmissions for non-profit education and scholarship within the class-

room setting.

- (c) The burden of proof in matters of fair use should rest, as a matter of law, on the copyright proprietor and not on the non-profit educational or scholarly user.
- (d) Statutory damages for innocent infringement by educators and scholars in non-profit uses should be waived mandatorily. The non-innocence of such use shall be extermined only by a court.

(e) Duration of copyright should be on the present basis of a limited initial term of 28 years, plus a renewal term of 28 or 48 years. In addition, the Ad Hoc Committee supports the position taken by

(1) the librarians, for amending section 108, and
(2) the instructional and public broadcasters, for amending section 111 (b) and adding section 118.

American Society of Composers, Authors and Publishers, New York, N.Y., September 30, 1975.

Re: H.R. 2223.

Hon. ROBERT W. KASTENMEIER, House of Representatives Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: In the course of its hearings on H.R. 2223, your Subcommittee did not touch upon a subject that was, from 1931 until very recently, an established part of our copyright law—the obligations of establishments using background music in the form of radio broadcasts over loudspeak-

For over four decades, on the authority of Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931), ASCAP licensed establishments performing music which originated as radio broadcast transmissions when loudspeakers were used to further transmit the music to the public. This was done on an even-handed and uniform basis throughout the country. By 1973, this licensing extended to 5,150 such establishments, resulting in total gross revenues to ASCAP's members of \$250,000 annually. As a matter of policy, ASCAP did not attempt to license those establishments which used only a single radio receiver apparatus of the kind commonly used in the home. It was felt that such establishments, which were generally of the "Mom and Pop" type of small business, did not use music to such commercial advantage that licensing would be warranted, even though technical infringements of copyright might be occurring.

When your Subcommittee considered copyright revision legislation (H.R. 2512) in 1967, it codified both the Jourcll-LaSalle decision and ASCAP's policy in Section 110(5) of the bill, which is identical to Section 110(5) of H.R. 2223. That

Section reads:

"§ 110. Limitations on exclusive rights: Exemption of certain performances and displays

"Notwithstanding the provisions of section 106, the following are not infringements of copyright:

"(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:

"(A) a direct charge is made to see or hear the transmission; or "(B) the transmission thus received is further transmitted to the public." Your report on the bill (H. Rep. No. 83, 90th Cong., 1st Sess., 1967) explained the genesis of this provision. It said:

"MERE RECEPTION IN PUBLIC

"Unlike the other clauses of section 110, clause (5) is not to any extent a counterpart of the "for profit" limitation of the present statute. It applies to performances and displays of all types of works, and its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use. The main effect of this exemption would be to allow the use of ordinary radios and television sets for the incidental entertainment of patrons in small business or professional establishments such as taverns, lunch counter, hairdressers, dry cleaner, doctors' offices, and the like. The clause has nothing to do with community antenna operations, and there is no intention to exempt performances in large commercial establishments, such as bus terminals, supermarkets, factories, or department stores, where broadcasts are transmitted to substantial audiences by means of loudspeakers covering a wide area. The exemption would also be denied in any case where the audience is charged directly to see or hear the transmission.

"The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the committee believes that the exemption should be made explicit in the statute. Some fears have been expressed that technical improvements in a 'single receiving apparatus of a kind commonly used in private homes' might some day lead to abuse of this exemption, but the committee does not feel that this remote possibility justifies making vast numbers of small business and professional people guilty of technical infringements." (at p. 48)

The report further explained, in its discussion of the definitions of "perform," "display," "publicly," and "transmit" that the bill was intended to define such

uses as "performances". The report said:
"Under the definitions of "perform," "display," "publicly," and "transmit" now in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he sings a song; a broadcasting network is performing when it transmits his performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a community antenna service is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a "performance" or "display" under the bill, it would not be actionable as an infringement unless it were done "publicly," as defined in section 101. Certain other performances and displays, in addition to those that are "private," are exempted or given qualified copyright control under sections 107 through 116." (at p. 27)

In 1973, in the normal course of its licensing activity, ASCAP offered to license George Aiken, who owned several fast-food restaurants in Pittsburgh, and who used radio broadcasts over several loudspeakers as background music in his establishments. Mr. Aiken repeatedly refused the Society's license, and ASCAP brought suit against Mr. Aiken in the name of its members whose compositions had been performed, on two counts of copyright infringement. After trial, the District Court found for the copyright proprietors, Twentieth Century Music Corp. v. Aiken, 356 F.Supp. 271 (W.D.Pa. 1973). However, the Third Circuit reversed the trial court's judgment, 500 F.2d 127 (1974), and, on June 17, 1975, the Supreme Court affirmed the Third Circuit's decision, 420 U.S. 921, 43 U.S.L.W. 4799, by a vote of 6-2-1 (Justice Blackmun concurring in result only,

and Chief Justice Burger and Justice Douglas dissenting).

The Court principally relied upon its previous decisions in Fortnightly Corp. v. United Artists, 392 U.S. 390 (1968) and Teleprompter Corp. v. CBS, 415 U.S. 394 (1974). Those cases held that cable television systems did not "perform" under the 1909 Copyright Act because they more closely resembled the passive viewing audience than the active broadcaster. The Court analogized between the acts of such CATV systems and those of Aiken, notwithstanding many differences between the two uses. As you know, however, cable television does "perform" under H.R. 2223. Therefore, the main rationale of the Aiken case would not exist under the copyright revisions bill—even using the Court's logic, without relying on the express language of § 110(5), Aiken would "perform" because a CATV system would "perform."

In addition, the Court felt that holding that Aiken "performed" would result in an unenforceable and inequitable result. On the unenforceability of such a

decision, the Court said:

"One has only to consider the countless business establishments in this country with radio or television sets on their premises—bars and beauty shops, cafeterias and car washes, dentists' offices and drive-ins—to realize the total futility of any even-handed effort on the part of copyright holders to license even a substantial

percentage of them." (43 U.S.L.W. at 4802).

However, while the Court, in a footnote, alluded to ASCAP's policy of not requiring a license from establishments using only a single, home-type receiver, it did not take into account the fact that most establishments of the type mentioned do use only that type of receiver. Those establishments would be exempt from liability under § 110(5) of H.R. 2223 for the same reason that ASCAP had licensed only those establishments (such as commercial finance offices, banks, and restaurants) which went to the expense of installing multiple loudspeaker systems for the use of radio broadcasts as background music. And, while there has always been discussion (as in the Court's opinion) of the omnipresence of music in business establishments, most of those establishments either subscribe to background music services (ASCAP licenses extend to approximately 100,000 such establishments) or use single-speaker radio receivers.

As Chief Justice Burger said in his dissent, Aiken "took the transmission and used that transmission for commercial entertainment in his own profit enterprise, through a multispeaker audio-system specifically designed for his business purposes." The rendition in a small establishment over a single, home-type receiver

is a remote and minimal use. But renditions over loudspeaker systems represent significant commercial uses of radio broadcasts as background music, serving as the functional equivalent of a record or tape player, background music services. or, indeed, of a live orchestra. Those uses should be paid for.

The majority, however, thought that a ruling in favor of the copyright proprietors would be inequitable, because even if Aiken took an ASCAP license, he would not be free of liability for the performance of compositions not in the ASCAP repertory. The Court overlooked the fact that an entrepreneur in Aiken's position would seek to secure a license from each of the three major performance right organizations, ASCAP, BMI and SESAC. Having done so, like virtually every other commercial user of music in this country, he would be secure in performing copyrighted musical compositions.

The Court also felt that a decision in favor of the copyright proprietors would authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work. But, we submit, it is the proper purpose of the copyright law to enable authors, composers and publishers to be paid for all commercial uses of their works. There is no doubt that Aiken and others like him profit from the renditions at their establishments. Copyright proprietors

whose works are so used should also be paid.

It is interesting to note that the Court's decision in Aiken establishes a rule of law which is contrary to that in existence in virtually every Western country. It is the general rule abroad that a commercial establishment using a radio receiver and loudspeakers (even the single, home-type radio or television set) "performs" copyrighted compositions. It has often been said, in arguments directed against the so-called "jukebox exemption" in the 1909 Copyright Act, that it is anomalous to deprive authors and composers of payment for use of their works in this country when such uses are almost universally recompensed in other countries. It would be equally anomalous to perpetuate the rule of Aiken in the copyright revision bill.

As Chief Justice Burger said in his dissent "the issue presented can only be resolved appropriately by Congress." ASCAP therefore wishes to go on record as favoring the provisions of Section 110(5) of H.R. 2223, and urges your Sub-committee to retain those provisions. We also ask that this letter be made part of the record, and respectfully request that the reasons we have advanced for the enactment of these provisions be incorporated in the Subcommittee's report to the end that all commercial establishments using music in this way

will be "performing" within the meaning of the Copyright Law.

Respectfully.

BERNARD KORMAN.

American Society of Composers, Authors and Publishers, October 30, 1975.

Re H.R. 2223.

Hon. ROBERT W. KASTENMEIER, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I understand the Register of Copyrights testified yesterday on the so-called ballroom amendment. You may recall that I wrote to you on August 6, 1975 setting forth the reasons for ASCAP's opposition to any such amendment. A copy of my letter is enclosed.

In reviewing my letter I find I did not include a statement as to the amount of money involved. Based on amounts now being paid to ASCAP by establishments performing live music, composers, authors and publishers would lose between \$7 million and \$8 million per year.

That conclusion is based on my belief that, as a practical matter, nearly all of the fees now being collected would be lost because it would simply not be possible to license musicians for the reasons I indicated on August 6th.

If the amendment were adopted and a very expensive campaign were undertaken to license musicians, and if that campaign were to be successful, the cost of licensing would be enormously increased so that the musicians would in fact have to pay very much higher fees than the owners now pay in order for the creators to receive the amounts they now receive. It is my experience, based on 25 years of dealing with owners of establishments, that efforts to license musicians would not be successful and that the final result would be loss of this very significant source of income.

Indeed, this matter is of very great importance to composers and authors and if the Subcommittee believes there is any merit to the ballroom operators' suggestion, I believe that the proper course is to withhold action on the suggestion as a proposed amendment to the general revision bill and to have the measure introduced as a separate bill so that it can receive the attention so far-reaching a proposal deserves.

I am convinced that a full record would establish that the present licensing

practice is in the public interest and should not be changed.

Respectfully,

BERNARD KORMAN.

Enclosure.

August 6, 1975.

Re Copyright Revision Legislation (H.R. 2223). Hon. ROBERT W. KASTENMEIER. House of Representatives Washington, D.C.

Dear Congressman Kastenmeier: I understand that some months ago, a suggestion was advanced that H.R. 2223 should be amended to exempt ballroom operators from copyright liability in those cases where the bands are engaged as "inde-

pendent contractors", and impose liability solely upon the musicians.

ASCAP would strongly oppose any such amendment for a number of reasons. First, we think the many cases holding the proprietor of a dance hall or similar establishment liable for copyright infringement are sound. Performances of musical compositions by a band or orchestra occur only when a proprietor believes they will attract patrons and so enhance his revenues. This is true whether the band members are engaged as employees or under agreements designed to make them "independent contractors". Many cases impose liability whether or not the proprietor had knowledge of the compositions to be played or exercised any control over their selection. The cases are reviewed in Shapiro, Bernstein & Co. v. H. L. Green Company, 316 F.2d 304 (2d Cir. 1963). The leading cases are:
Dreamland Ball Room v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929):

M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 470 (E.D.S.C. 1924) aff'd 2 F.2d 1020 (4th Cir. 1924); Bourne v. Fouche, 238 F. Supp. 745 (E.D.S.C. 1965);

M. Witmark & Sons v. Tremont Social & Athletic Club, 188 F.Supp. 787 (D.Mass,1960);

Shapiro, Bernstein & Co., Inc. v. Veltin, 47 F.Supp. 648 (W.D.La. 1942); and Harms v. Cr. en, 279 Fed. 276 (E.D.Pa. 1921).

Indeed, in the Veltin case, the proprietor had stipulated in his contracts with orchestra leaders that no ASCAP music be played, and had even gone so far as to post signs in his establishment objecting to the performance of ASCAP music. Nevertheless, he was held liable.

Exemption of the ballroom operators from copyright liability and imposition of liability solely on the band would necessitate drastic and very expensive changes in the way musical performances are licensed. In many instances, it would become virtually impossible for the author, composer, and publisher of a copyrighted work to secure any payment for the performance of his music.

ASCAP and other performing right licensing organizations license on an annual or, in many cases, a seasonal basis. It is possible to do so because the same owner can be dealt with on a year to year basis. The bands employed, on the other hand, are often itinerant or even "pick-up" groups, constantly re-forming with new personnel, who often play in one location fo. mly a short period and then move on to another or disband. Finding and licensing them would be much more difficult and, of course, much more expensive than the present system.

ASCAP bases its license fees for performances in establishments such as ballrooms, taverns, and restaurants on objective factors, including seating capacity, type and frequency of musical entertainment, admission cover, or similar charge, and drink prices. Because these factors, which constitute the establishment's "operating policy", are fairly constant and can be easily determined in the event of change ASCAP is able to keep its costs of licensing down, and consequently maintain low license fees. The enclosed form of agreement shows the factors and the rates which start at only \$70 per year.

Under the proposed amendment, as it has been described to me, it would be necessary for ASCAP to license the bands. It would be very difficult to locate and keep track of the constant movement of all the different bands across the country. Similarly, it would be necessary to determine the operating policy of each establishment when a given band played, and base a license fee on the policy during the period of the band's engagement. The higher cost of licensing on this basis would have to be passed along in higher license fees.

Licensing musicians would also create difficulties with the musicians' union, the American Federation of Musicians (AFM). Article 25, Section 16 of the

AFM By-Laws (1973) provides:

"Leaders and members of the Federation are prohibited from assuming any responsibility for the payment of license fees for any composition they play and from assuming or attempting to assume any liability whatsoever for royalties, fees, damage suits, or any other claims arising out of the playing of

copyright compositions.".

I think the question really comes down to who is most responsible for the performance and who derives the principal benefit. Certainty, the band members derive some benefit—they are paid to play. That payment, from the owner of the establishment, is usually an amount less than the increased revenues to the owner resulting from use of music. The proof of this is found in the frequent practice of "testing" use of music: if business picks up, it is kept; if it does not pick up—and does not earn more than the cost of the music—it is discontinued. In this sense, the use of music is "for profit" or it is not used at all.

Accordingly, the owner of the establishment decides whether music will be performed at all and, if it is, obtains a more significant return than the musicians. Therefore we think it is fair that the owner should pay for the

right to perform the music.

With best wishes for a pleasant summer, Respectfully,

BERNARD KORMAN.

Enclosure.

H.R. 2223—Copyright Law Revision

A Position Paper—Association of American Publishers

The Association of American Publishers supports, with certain minor exceptions, H.R. 2223 as it was introduced. We believe it represents an equitable compromise between the needs of those who create copyrighted intellectual properties and those who use them. The AAP has testified or submitted written statements on those provisions of the Copyright Revision Bill which fall within its sphere of interest. What follows is a concise overview of these positions. We hope this will be of assistance to the Subcommittee as it begins its markup of the bill.

SECTION 107-FAIR USE

The AAP believes that this section is a helpful statement of the principles of Fair Use. It is generally recognized that an attempt to define those specific actions which may or may not constitute Fair Use would involve impossible complications, and would also risk making the legislation so rigid that it would rapidly become outdated by technological advances.

SECTION 108-LIBRARY PHOTOCOPYING

The AAP supports the copying privileges extended to libraries by Section 108. However, we are opposed to any further encroachments on the rights of authors and other copyright owners, and we are opposed in particular to the elimination of Section 108(g). Much of the copying now done by libraries would be permitted under the principles of Fair Use set out in Section 107. In addition, a good deal of library copying over and above the permissible limits of Fair Use would be allowed under the provisions of Section 108. The advantages of these provisions are set forth in a candid report of the American Library Association Copyright Committee, dated July 1974: "We now have provisions (under Section 108) permitting photocopying of archival material, copying of material for preservation, freedom of liability for copying done by users on coin-operated machines on library premises, and the highly important provision permitting the making of single copies for normal interlibrary loan work (italic added). On the other hand, we have not been able as yet to reach agreement on 'systematic', a term used to describe copying in a system or network where one library agrees to discontinue its subscription to a journal and depend on another library in a

network to supply photocopies of articles from this journal when needed (italic added). Copyright proprietors, rightly or wrongly, believe such systems or networks constitute a potential threat to their rights and want to prohibit such copying by them without some sort of license."

There is a good deal of evidence that libraries are already engaged in "systematic" photocopying, as indicated by the following excerpt from a special May 1975 bulletin from the Center for Research Libraries. Inviting member libraries to request articles from the Center, the bulletin stated: "All requests the Center cannot fill from its own collection will be forwarded immediately via teletype to the British Library Lending Division in Boston Spa" for photocopying. The bulletin went on to say: "The expansive comprehensive coverage offered under this new program is expected to benefit the members in two ways. First, by giving them simpler and faster access, on interlibrary loan, to more materials they cannot immediately supply from their own collection. Second, by giving them more freedom and flexibility in allocating their acquisitions expenditures for journals to improve service and accessibility."

It should be stressed that publishers are not in any way opposed to the wider dissemination of materials which is the aim of such programs. We do insist that systematic photocopying requires prior permission and agreed

compensation.

Librarians profess to some difficulty in understanding the term "systematic copying" as used in Section 108(g)(2). In the words of the Senate report, however, this term is readily distinguishable from copying done pursuant to "isolated single, spontaneous requests such as take place in normal library procedures." Systematic copying, on the other hand, "occurs when a library makes copies of materials available to users, either directly or through other libraries, under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as the prime source of such materials."

Section 108(g) also excludes from uncompensated library copying privileges the related reproduction or distribution of "multiple" copies. Systematic copying and multiple copying are general concepts; both are illustrated by examples in the Senate Committee report (which closely follows the discussion of Fair Use in the 1967 House Committee report), and neither is accorded more emphasis than a number of other familiar statutory or common law doctrines. The libraries do not claim an inability to understand the multiple copying concept; the

systematic copying concept is no less understandable.

What is missing, of course, is agreement among librarians and publishers to flesh out the necessarily general language of the proposed statute—not only to formulate reasonably detailed "Fair Use" photocopying guidelines for the assistance of library patrons and employees, but also to establish workable clearance and licensing procedures for photocopying beyond "Fair Use." The AAP, together with other proprietary groups, has long sought and worked for such an agreement. Had agreement been reached, the controversy over Section 108(g) would not now exist.

Further with regard to the library photocopying conflict, the AAP fully supports the newly established Commission on New Technological Uses of Copyrighted Works. We believe, however, that it would be a serious mistake if the Congress sought to avoid coming to its own finite conclusions on key copyright issues on the grounds that such questions could logically be handed over to the Commission for decision. In our judgment, such a ourse would represent a serious abdication of Congressional responsibility, and would increase rather than decrease the ensuing confusion. The Commission will have to debate and resolve a great many difficult questions with respect to future technology. But the Commission's work will proceed on a far more hopeful basis if the Congress accepts responsibility for establishing workable guidelines with regard to present technology. In our judgment, Congressional endorsement of the existing language of Section 107 and Section 108 is the essential legislative requirement.

EDUCATIONAL EXEMPTION

The Ad Hoc Committee on Copyright Law Revision and the National Education Association are seeking a specific exemption for "not-for-profit" educational copying to be inserted into the revision bills. In the past both the House and the Senate Committees have rejected this proposal. House Report No. 83 of the 90th Congress cited valid reasons why this proposal exemption is not acceptable. In this regard the report said: "Because Photocopying and other

reproducing devices are constantly proliferating and becoming easier and cheaper to use, it was claimed that the future of some kinds of publishing is at stake and that solutions should be sought through reasonable voluntary licensing or clearance arrangements rather than an outright exemption that would hurt authorship, publishing, and ultimately education itself." This has long been the position of the AAP in negotiations with representatives of the educational community. The AAP, together with other proprietary organizations, is currently engaged in a new series of discussions with the Ad Hoc Committee aimed at drawing up guidelines for classroom photocopying which would serve as a handy reference for classroom teachers. In our view, however, enactment of H.R. 2223 in its present form is needed to provide a solid framework to these negotiations. We strongly urge that the House Committee follow its own past example and the more recent action of the Senate and refuse to support any specific "not-for-profit" educational exemption in the copyright bill.

SECTION 112(b) -LIMITATIONS ON EXCLUSIVE RIGHTS: EPHEMERAL RECORDINGS

Subsection (b). The AAP believes this exemption is overly generous and should be revised to accord with the twelve copy/five year limitation of the 1973 bill, H.R.~8186.

We are strongly opposed to the so-called Bayh Amendment which would permit the making of an unlimited number of copies, as well as the keeping and using of such copies over an indefinite period. It would also immeasurably broaden the number and type of organizations by and through which such broadcasts could be recorded and transmitted. In the long run this proposal would impede the development and distribution of instructional materials and therefore would injure rather than aid the cause of education.

TERMS OF COPYRIGHT

The Association fully supports the "Life Plus 50 Years" provision in the revision bill. The revised term of copyright is fair to authors in that it assures that the earnings of their life's work will not cease during their lifetime, as is now the case. In addition, it will bring the United States into line with the many other countries which have long since adopted the "Life Plus 50 Years" term. This will enable the United States to participate in more international agreements on copyrights.

PROPOSED PUBLIC BROADCASTING (MATHIAS) AMENDMENT

AAP opposes the demands for a compulsory licensing system, because this would permit public broadcasters and producers to use any book, poem and other literary work on programs without the copyright owner's permission, at nominal . es to be fixed by a "copyright royalty tribunal" and distributed by the Copyright Office. The heart of the matter is that there are occasions when an author or publisher would wish to decline to permit a reading or similar use because of the serious economic or aesthetic damage it might cause. Compulsory licensing would deprive him of that fundamental right, which is the sine qua non of the copyright protection provided by the Constitution.

Representatives of authors and publishers have had a number of meetings with public broadcasting representatives to work out voluntary licensing arrangements. Specifically, we made a five-point proposal comprising the following elements: (1) a standard one-page license form; (2) agreement to establish an expediting center or clearinghouse to expedite the handling of requests for the use of copyrighted material by public broadcasting; (3) a quantitative definition of "Fair Use" for purposes of public broadcasting; (4) a willingness to discuss a standard fee schedule, provided there is statutory protection against antitrust violations; and (5) generous exemptions for the blind and the deaf. Considerable progress toward agreement was made on this basis of our proposals, but the public broadcasting interests ultimately decided to reject all efforts to reach voluntary accommodations, and instead insisted on pressing their demands for compulsory licensing.

Our counterproposal persuaded the McClellan subcommittee that the demand for a compulsory licensing system was not warranted. Shortly after this subcommittee vote, the public broadcasting people broke off negotiations with us, so that efforts to find a compromise have been in abeyance since early summer. Author and publisher representatives are willing and ready to continue working

with public broadcasters to establish voluntary licensing arrangements. If demands for a compulsory licensing system are rejected, we are confident that our discussions with public broadcasting representatives will be resumed, and can achieve a reasonable voluntary accommodation. Indeed, AAP is prepared to make the voluntary licensing system available even if public broadcasting representatives refuse to resume joint negotiations.

The Register of Copyrights, in a letter of January 31, 1975 to Senator McClellan, argued with force and eloquence that the Mathias Amendment "goes much too far in creating new and additional exemptions to the legitimate rights of authors and copyright proprietors," is not "justified or necessary," and should not be adopted. A copy of this authoritative letter is attached, and we commend it to the careful attention of the subcommittee.

EXEMPTION FOR THE HANDICAPPED

We have not seen the specific language proposed by public broadcasting interests for amendments to be included in H.R. 2223, and therefore cannot address them specifically. We can, however, state our position with reference to two sections proposed by the Subcommittee of the Senate Judiciary Committee for inclusion in the Senate bill, S. 22. Section 110(8) would provide that performance of a literary work as part of a program specifically designed for broadcast on noncommercial educational radio and (elevision stations "to a print or aural handicapped audience" is not an infringement of copyright. The publishers association fully supports the essence of the subsection. We hope, however, that the Congress will take steps to clarify the somewhat awkward and opaque phrase, "print or aural handicapped audience." In addition, we support the proposed Section 710 of S. 22 which would establish procedures whereunder the copyright owner may voluntarily grant a license to the Library of Congress to produce braille copies or phonorecords for the blind and physically handicapped.

SECTION 601, MANUFACTURING CLAUSE

Philosophically, the AAP is opposed to any type of trade restrictions which impede the free flow of educational and cultural materials. At the same time we recognize the political realities of the present situation, and accordingly accept and support the present language of Section 601 in the interests of facilitating passage of the bill as a whole. We do hope, however, that this section can eventually be eliminated from the statute, as it constitutes a continuing temptation to developing countries to impose a variety of protectionist measures that work generally to restrict the international flow of information and educational materials.

COPYRIGHT OFFICE, THE LIBRARY OF CONGRESS, Washington, D.C., January 31, 1975.

Hon. John L. McClellan, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATCR McCLELLAN: This is in reference to your letter of September 22, 1974 requesting the views of the Copyright Office on two amendments to the Copyright Revision Bill proposed separately by Senators Mathias and Bayh in the 93rd Congress, which you anticipate will be raised again during the consideration of S. 22.

Senator Mathias' proposal, identified as Senate Amendment No. 1815, would have created a compulsory license to use copyrighted nondramatic literary and musical works, sound recordings, and pictorial, graphic, and sculptural works in the transmission of educational television or radio programs on noncommercial educational broadcast stations.

Senator Bayh's proposal, identified as Senate Amendment No. 1831, would have granted an unlimited exemption to nonprofit organizations and governmental bodies to make copies of programs they transmit and to distribute the copies for transmission by other similar organizations. The revision bill as it passed the Senate and the pending bill, S. 22, permit such organizations to make 30 copies or phonorecords, subject to the limitation that all copies and phonorecords, with the exception of one for archival purposes, must be destroyed within seven years from the date the program was first transmitted to the public.

I am in full support of the objectives of public educational broadcasting, and I sympathize with the aims of the Mathias and Bayh proposals to facilitate these

objectives. Nevertheless, despite the worthy motivations behind these proposals, I feel that they go much too far in creating new and additional exemptions to the legitimate rights of authors and copyright proprietors. The copyright system can fulfill its objective of promoting "the progress of science and the useful arts" only if the exclusive rights of authors to control use of their works and receive payment on a negotiated basis are respected. Reasonable exceptions to these exclusive rights are appropriate and necessary: the revision bill already grants many exceptions for nonprofit organizations and governmental bodies, and on some especially difficult, complex issues it has been necessary to resort to compulsory licensing systems. However, I am becoming increasingly concerned about the implications of widespread compulsory licensing of copyrights, and the dange-s that these systems bring to bear on creativity and freedom of expression.

The revision bill provides significant exemptions with respect to performances and displays of certain copyrighted works on educational television for instructional purposes. The fair use provisions of section 107 would also permit limited use of excerpts on public broadcasting stations in general. The concessions regarding instructional television are especially significant. They meet the greatest need of educational television and permit broad access to certain copyrighted works on a basis comparable to educators in a classroom. These exemptions were carefully worked out as a reasonable compromise, and they have

my general support.

On the other hand, a broad compulsory license to use certain works on opencircuit educational television such as that proposed by Senator Mathias, is not, in my opinion justified or necessary, and I urge the Judiciary Committee not to adopt it. In presenting noninstructional programs, educational television directly competes for viewers with commercial television. Uncontrolled use of copyrighted works on educational television, even though subject to some payment as determined by the Copyright Royalty Tribanal, would seriously interfere with the markets for the author's works on commercial television, and would unquestionably decrease their value. Nondramatic literary works are particularly vulnerable since the author's market for performing them is so small. I realize that the budgets of public broadcasting stations are very small, and that the costs of obtaining clearances for small incidental uses of photographs, drawings, and the like can be unjustified, costly, and bothersome, but the broad-brush approach of the Mathias proposal seems unsuitable as a solution to this problem.

Addressing myself directly to the details of the proposal, I believe as a policy matter that the failure to establish any statutory royalty makes the plan unworkable. Unless the parties negotiate the payment, all cases would have to be handled by the Copyright Royalty Tribunal. The burden on the Tribunal would be staggering. The administrative costs could well exceed the royalties assessed. In my cpinion, it would be far more economical to increase the governmental subsidies to public television to pay for programming costs, including permissions.

I am also unable to support the Bayh Amendment. As outlined earlier, the revision bill provides an exemption to make 30 copies or phonorecords for transmission. I feel that some limitation is essential, and 30 copies should be ample to facilitate the activities of nonprofit organizations. The circulation of as many as 30 copies itself presents some danger to creators, since it is extremely difficult to insure that unauthorized copies are not made. Moreover, I believe a limitation on the period the copies or phonorecords may be held is eminently sound. There is nothing magic about a seven-year cut-off but, as a matter of principle, if a program is to be rebroadcast after a substantial period following the initial transmission, the authors and proprietors of the copyrighted works embodied in the program should be entitled to renegotiate a new deal, including additional compensation.

In conclusion, I must oppose the broad exemptions from the rights of authors proposed in the Mathias and Bayh amendments. The laudable objectives of public television and radio can be achieved more appropriately, and probably more economically, by direct support through government funding of public broadcasting. Direct subsidies represent recognition of the often-stated but fundamental truth, that creators of copyrighted works are entitled to just rewards from society for their endeavors as surely as administrators, technicians, performers, and other workers engaged in public broadcasting.

Sincerely yours,

BARBARA RINGER, Register of Copyrights. THE AUTHORS LEAGUE OF AMERICA, INC., New York, N.Y., September 30, 1975.

1. SUMMARY OF THE AUTHORS LEAGUE POSITION ON S. 22—THE COPYRIGHT REVISION BILL

The Authors League supports S. 22 in its present form, as approved by the Senate Judiciary Committee and enacted by the Senate last fall.

The Authors League opposes the demands by organizations of teachers, librarians and public broadcasters for further broad exemptions to use copyrighted works without permission or payment. These additional exemptions would heavily penalize authors and cripple the system of independent, entrepreneurial authorship and publishing which, as the Supreme Court ruled, the Constitution intended the Copyright Act to sustain and protect.

2. WHAT THE BILL PROVIDES FOR AUTHORS

The existing 1909 Act gives strong protection to authors. The Copyright Revision Bill is not a wind-fall measure to enrich them. It makes a long-delayed adjustment in the ceiling on composers' record royalties and grants them minimal fees for juke box performances. But the Bill will not increase the compensation authors can obtain for uses of their books, plays and poetry.

Rather, the Bill revises outmoded technical requirements and establishes a unified Federal system of copyright which is based on the single term of protection used in most other countries: the author's life plus fifty years. This term assures that authors will not outlive their copyrights and that those whose works survive, and their families, will receive part of the income their creations produce for users, for a few more years. However, this term is the keystone of a single copyright system, and gives scholars and historians much earlier access to unpublished materials than is allowed under the present dual system of comon law and statute

3. THE PRIVILEGES OF TEACHERS, LIBRARIANS AND PUBLIC BROADCASTERS

The Revision Bill does not diminish the privileges granted to teachers, librarians, and public broadcasters under the present Copyright Act. On the contrary, these privileges to use copyrighted works without permission or compensation are made more explicit and are expanded by Secs. 107, 108, 110 and 112 of the Revision Bill. In their present form, these sections embody substantial compromises made by authors and publishers to meet the demands of teachers, librarians and public broadcasters. The further exemptions now demanded have previously been rejected by both Judiciary Committees, and both Houses, after several rounds of hearings at which they were debated extensively.

4. DEMANDS FOR AN ADDITIONAL LIBRARY "PHOTOCOPYING" EXEMPTION

As the Judiciary Committee Reports explain, considerable library photocopying is permitted under fair use, which Sec. 107 writes into the Copyright statute. Beyond that, Sec. 108 gives libraries broad, new privileges to reproduce copyrighted works for archival purposes, replacement of lost copies, and to fill patrons' request for out-of-print books.

In additional, Sec. 108(d) permits libraries to produce a "single copy" of journal articles and small portions of books to fill patrons' orders. However, Sec. 108 (g) allows such copying only on an "isolated" basis, on separate occasions; and prohibits multiple copies or the "systematic" reproduction of single copies. Librarians demand Sec. 108(g) be eliminated to create a further exemption permitting uncompensated systematic reproduction of single copies—i.e. one copy for each user who requests it. The Authors League strongly opposes this new exemption.

Reproduction of "single copies" to fill each order is a primary and growing means of disseminating journal articles and other works, widely used by commercial reprint publishers and large libraries. A fundamental purpose is to supplant subscriptions and purchase of reprints from publishers. Authors and publishers do not seek to halt systematic library reproduction, but ask reasonable compensation. The Senate Judiciary Committee agrees: it recommended they work with librarians to establish "workable clearance and licensing systems" for systematic copying, and to develop guidelines for distinguishing isolated from systematic reproduction. Several meetings have been held; librarians have de-

clined to establish guidelines but have discussed licensing systems proposed by

author/publisher representatives.

Both issues will now be considered by the Commission on New Technological Uses of Copyrighted Works, recently established by Congress for that purpose; and by study groups working under the auspices of the National Commission for Libraries and Information Science and the Copyright Office. A licensing system must be established. Uncompensated systematic library reproduction would cause severe damage to authors and publishers, and destroy scientific and scholarly journals with limited circulations.

5. DEMANDS FOR AN ADDITIONAL "EDUCATIONAL EXEMPTION"

Secs. 107 and 110 of the Revision Bill give educators broad privileges to copy copyrighted works and perform them in classroom teaching and instructional television broadcasts. But teachers' organizations seek more—an exemption which would permit schools and teachers, among other things, to reproduce multiple copies of "brief excerpts" from copyrighted works, and entire "short literary, pictorial and graphic works." Both Judiciary Committees have rejected this demand in the past. The House Report emphasized that "the doctrine of fair use as properly applied is broad enough to permit reasonable educational use", and the guidelines to educational fair use in the Reports are more explicit than the vague language of the educators' proposed exemption.

The Authors League opposes this demand for a further "educational exemp-When schools or teachers wish to reproduce copies beyond the broad limits of fair use, authors should be compensated. As the House Judiciary Committee urged, the parties should join "to work out means by which permissions for uses beyond fair use can be obtained easily, quickly and at reasonable fees." Teachers'

spokesmen have refused to discuss this solution.

6. AUTHORS ARE ENTITLED TO COMPENSATION FOR SCHOOL AND LIBRARY USES EXCEPDING **SECS. 107 AND 108**

Authors are "educators" and make valuable contributions to the educational process and to libraries. Many books are published primarily for educational or library use. Many eminent authors and poets earn a significant portion of their income from the reproduction of their works, or excerpts, in anthologies and collections published for school and library users. Authors are entitled to reasonable compensation (no less than the Xerox Corporation, library employees or suppliers) when schools and libraries use modern reprographic machinery to reproduce copies of their articles, poems, books or other works beyond the broad limits of Secs. 107 and 108. To deny them such compensation is unfair. And it is short-sighted, for the damage caused by these additional exemptions could stifle the creation and publication of works that best serve the interests of school and library audiences.

7. DEMANDS FOR AN ADDITIONAL PUBLIC BROADCASTING EXEMPTION

Sec. 110 of the Revision Bill grants instructional television and radio programs the right to perform literary works without permission and payment. Both instructional broadcasters and other public broadcasters are entitled to quote, and use facts and material, from copyrighted works under the doctrine of fair use, as

both Judiciary Reports emphasize.

Public broadcasters have demanded more—a further amendment which would allow them to use literary works on any public broadcasting program without the author's permission, and on payment of standardized fees to be fixed by a tribunal under a compulsory licensing system. The Authors League strongly opposes this proposal. Compulsory licensing would permit broadcasts of a book that could reduce its sales, or prevent the author from licensing its use on commercial broad-

casting stations, motion pictures or records.

Permissions to use books on public broadcasting can be obtained under voluntary licenses from their authors or publishers. Such licenses are granted under the present law. Public broadcasting cannot make recordings of copyrighted literary material without the author's permission; and practically all public broadcast programs must be recorded, to permit repeat broadcasts and distribution to other stations. These licenses are granted by authors at very modest fees. Moreover, authors and publishers have negotiated with public broadcasters to establish standardized license forms and procedures to expedite the clearance

of licenses. Public broadcasters terminated these ascussions to press for their Amendment in House Subcommittee hearings. We or red to resume whenever they are ready.

Public broadcasting negotiates on a volunt of Lasis with its producers, directors, actors; and with those who produce it. program materials—film companies, television producers, etc. It easily can negotiate of its authors for uses of their works, which are a small part of its program ing. Moreover the compulsory license system they propose is far more costly and burdensome. Two public agencies would operate it. The costs would be deducted from authors' compensation. Broadcasters would have a much heavier administrative burden than under voluntary licensing. There would be constant rate-making hearings and appeals. And to top it all, the system could not establish reasonable rates; compensation for performances of literary works cannot be established on a standardized basis, in contrast to the blanket licensing of performance rights in music.

8. DEMANDS FOR AN UNLIMITED EXEMPTION FOR RECORDINGS OF INSTRUCTIONAL BROADCASTING PROGRAMS

Sec. 110(2) allows the uncompensated performance of literary works on instructional broadcasts which are part of systematic instructional activities of non-profit educational institutions. This was initially intended to equate such broadcasts with classroom teaching—a live use. Next, Sec. 112 was amended to allow a station to use one recording, for a limited time—make repeat broadcasts. Sec. 112 has now been expanded to allow the production—of 30 recordings which may be used for a 7 year period. This far transcends the conginal purpose of these sections. It permits such broadcasters to go into the business of producing recorded programs, like a film company or television production enterprise. In all fairness, authors should be paid for such extensive use of their works. But they only can ask compensation if a broadcaster—shes to make more than 30 copies or use the recordings after 7 years.

copies or use the recordings after 7 years.

Not content with this windfall, instructional of adcasters now ask for the removal of this 30 copy-7 year limitation. They ask, in the Bayh amendment, for the privilege of making any number of copies and distributing them for any number of years. The Authors League strongly opposes this proposal. These recordings are produced by professionals, who are paid for their work. When they choose to use an author's book beyond the already too-broad limits of Sec. 112, authors are entitled to be compensated.

9. THE PROPOSED EXEMPTION FOR BROADCASTING READINGS OF BOOKS TO THE BLIND

Public broadcasters have asked for an amendment to permit unauthorized performance of books on programs designed for blind audiences. This amendment is totally unnecessary. For 40 years the Library of Congress, through its Division for the Blind and Physically Handicapped has disseminated thousands of literary works to the blind in braille editions and TALKING BOOK records. All of this has been done solely by permission of authors and p. "bers, sought and obtained by the Library—without compensation. Broadcasts the blind can be licensed in the same manner, without charge.

10. THE ANTI-COPYRIGHT ARGUMENTS

(i) The Alleged "Non-Profit" Exemption. Teacher organizations have argued that schools enjoy a "non-profit" copying exemption under the present law. They are wrong. There is no such provision in the 1909 Act. As the House Judiciary Committee Report stressed. "The educational groups are mistaken in their argument that a 'for profit' limitation is applicable to educational copying under the present law."

(ii) The Antitrust Argument. Library and teacher spokesmen label copyright as a "monopoly", suggesting it offends the Sherman Act. This is not so. Copyright does not give an author control over the market in books. His work competes with thousands of others. His copyright only grants him exclusive rights in the book he created. This is a "monopoly" only in the sense that any form of property is—i.e. a collection of exclusive rights in something. Copyrights do not allow authors to collectively deny their books to schools or libraries, as teachers collectively deny their services or fix prices for them, when they and their unions conduct strikes.

(iii) The Restraint of Information Argument. Library and teacher spokesmen argue that a copyright restrains dissemination of information. This is incorrect. Patents prevent others from using the ideas they protect. Copyrights do not impose those restraints. Anyone, including other authors, is free to use the ideas, facts or information of a copyrighted work. Anyone is free to create a similar work. A copyright only protects against substantial copying of the author's expression. The Supreme Court has never interpreted "freedom to read" under the First Amendment to mean that copyrighted works ca.. be reproduced free of charge; it frequently has emphasized that there is no conflict between publication for profit and the First Amendment.

(iv) The Mere Privilege Argument. Teacher and library spokesmen argue that copyright is a "mere privilege" because it is granted by statute. But a literary work is absolute property under common law because "it rests upon the natural moral right of each one to enjoy the products of his own exertion . . . " Moreover, all property rights are established by the state; thus, billions of dollars worth of property in and and resources are created by federal and state statutes. Art. I, Sec. 8 of the Constitution enumerates the powers Congress was expected

to exercise: enacting copyright laws is listed along with the others.

As the Supreme Court ruled, the Constitution intended that authors be granted "valuable, enforceable" rights to encourage them to produce works of lasting value. Protecting authors rights, not destroying them, was how the Constitution intended to promote literature, education and the arts. Compensating authors for uses of their works, not denying them remuneration, is the method it chose to promote the public interest.

> JOHN HERSEY, President. JOHN BROOKS, BARBARA TUCHMAN. Elizabeth Janeway, HERMAN WOUK.

THE AUTHORS LEAGUE OF AMERICA, INC., New York, N.Y., December 9, 1975.

HERBERT FUCHS, Esq., Rayburn House Office Building Washington, D.C.

DEAR HERB: I'm enclosing a copy of my letter to Senator Mathias dated December 8, 1975, and copies of the two memoranda referred to therein—all with respect to the elimination of literary works from the compulsory licensing system of Section 118.

Sincerely.

IRWIN KARP.

Enclosures.

THE AUTHORS LEAGUE OF AMERICA, INC., New York, N.Y., December 8, 1975.

Hon. CHARLES MCC. MATHIAS, Jr., U.S. Senate. Washington, D.C.

DEAR SENATOR MATHIAS: I wanted to thank you again for the opportunity of discussing the Authors League's reasons for opposing the compulsory licensing of literary works for public broadcasting. In accordance with your suggestion, I am submitting herewith memoranda summarizing:

(i) the dangers to freedom of expression inherent in the compulsory licensing of literary works, and the other reasons such a system should not be imposed on these works. (Memorandum A)

(ii) the procedural safeguards and clarifications that should be added if the compulsory licensing system is to be enacted. (Memorandum B)

Charles Lieb, counsel for the Association of American Publishers, and I prepared the memoranda, which reflect the views of the Association and the Authors League.

I also wanted to report on the meeting which Mr. Lieb and I had with public broadcasting's representatives, Messrs. Aleinikoff and Smith, on November 25th,

following my meeting with you and Mr. Klipper.

Mr. Lieb and I said that authors and publishers were prepared to establish the voluntary licensing system which had been negociated almost to the point of completion in our previous meetings—if books and other literary works were deleted from the "Mathias Amendment." We said on that basis we were ready to complete the drafting of the standard licensing form and prepare to set up the voluntary clearing house which the Association of American Publishers had offered to establish to expedite the simple licensing procedure. Mr. Lieb also stated that the Association was willing to discuss recommended rates if an antitrust amendment were adopted. The Authors League would be willing to do so, as well.

Mr. Alienikoff and Mr. Smith said this was not acceptable to public broadcasting. They said they hoped that publishers and authors would agree to work out the system we had been negotiating—but that it should take effect whether or not the Mathias Amendment was adopted, and that even if we agreed to that system, they would continue to press for the Mathias Amendment. And, they indicated that even if you deleted books from your Amendment, they might seek to have other members of the Senate press for their inclusion.

In effect, public broadcasting was saying "Heads we win, tails you lose." We believe that this position flatly contradicts the premise on which your Amendment was introduced—that if the parties negotiated a reasonable arrangement,

the Amendment would be withdrawn.

Mr. Lieb and I told Messrs. Smith and Aleinikoff that their proposal was not acceptable. We pointed out to them that the license form, which we were prepared to recommend as part of a voluntary system, granted public broadcasting much greater privileges than they would obtain under the compulsory licensing provisions and at much less expense and administrative burden. We said that if compulsory licensing were forced on authors and publishers they would exert every effort before the courts and the Tribunal to preserve their rights to the fullest extent possible. We also said that the rates ultimately fixed by a Tribunal under compulsory licensing might be substantially greater than the modest rates at which licenses are now granted and would be granted under the voluntary system we were negotiating to establish.

Messrs. Smith and Aleinikoff made it abundantly clear that public broadcasting is not prepared to accept voluntary negotiated arrangements for literary works rather than a statutory compulsory licensing system. They reiterated that no agreement with authors and publishers would be acceptable unless the 5 conditions they presented to us in June of 1975 were satisfied. These conditions are listed at p. 27 of our July 10th statement to the House Judiciary Committee's Copyright Subcommittee; a copy was sent to you, and another is enclosed. What public broadcasting insists on, in these conditions, is that no author can decline to grant a license, that there must be a binding fee schedule and that the arrangement must continue in perpetuity. In short: they demand conditions that could

only be satisfied by a mandatory, statutory licensing system.

Messrs. Aleinikoff and Smith told us that public broadcasting would not be averse to a procedure under which a notice would be served on an author before his work was used, so that he could file a "refusal of use" which would prevent that particular reading of his work. Mr. Lieb and I said this procedure was not acceptable for various reasons. An author might be out of the country or otherwise unavailable, when the notice was received. As the Register of Copyrights has indicated, such a system would be unworkable, administratively. And it would establish a dangerous precedent. Moreover, we believe that many authors would be put to considerable cost and burden-since public television producers frequently request licenses for works they never use, and since authors might be

required to pay filing fees to protect themselves against unwanted uses.

Mr. Lieb and I believe that we and our colleagues, who have participated in the previous meetings with public broadcasting's representatives, have made every effort to negotiate a reasonable arrangement for the voluntary licensing of literary works for public broadcasting. These efforts have failed for one basic reason—public broadcasting wants a statutory compulsory licensing system. Under that umbrella, and using that leverage would not object to negotiating voluntary licenses that give it even more. It , clear to us that public broadcasting takes this position because it thinks it has the political advantage, and can

get the Amendment passed.

The Authors League and the Association of American Publishers urge that

literary works should be deleted from your Amendment.

Mr. Lieb joined with me in preparing this letter and authorizes me to say that it expresses the views of the Association of American Publishers as well as the Authors League.

Sincerely yours,

THE AUTHORS LEAGUE OF AMERICA, INC., December 8, 1975.

Memorandum A to: Hon CHARLES McC. MATHIAS, Jr.

This memorandum, submitted by the Association of American Publishers and the Authors League of America, discusses (i) the dangers to freedom of expression inherent in the compulsory licensing of literary works for public broadcasting; (ii) the other reasons such a system should not be imposed on these works.

1. THE DANGERS TO FREEDOM OF EXPRESSION

The Mathias Amendment would write into the United States Copyright Act, for the first time, the dangerous concept of a compulsory license system for books, magazine articles, newspaper columns and other literary works. As the Register of Copyrights testified in October, opposing its application to literary works:

The loss of control by authors over the use of their work in a major mass medium of communication, and the dangers of state control and loss of freedom of expression implicit in the proposed system would probably be too high a price to pay even if public broadcasting were being severely hampered by the legal obligation to get clearances."

Moreover, as she indicated, public broadcasting has not had any such difficulties.

The compulsory licensing of literary works is utterly repugnant to the First Amendment principle that government may not compel the press to publish that which it chooses not to publish. In its 1974 opinion in Miami Heralā Publishing Co. v. Tornillo (418 U.S. 241), the Supreme Court noted that it had for years "expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print."

Such compulsion, said the Court, is unconstitutional; it cannot "be exercised consistent with the First Amendment guarantees of a free press." (at. p. 258)

Of course, the publishers and authors of books, magazines and other literary works are entitled to the same full measure of protection under the First Amendment. (see, for example: Time, Inc. v. Hill, 385 U.S. 374; Bartam Books v. Sullivan, 372 U.S. 58; Winters v. New York, 333 U.S. 505). And it is equally repugnant to the First Amendment that government should compel an author or publisher to permit the broadcast of a book he does not choose to have broadcast. Such a compulsory licensing system would deprive the author of protection against unauthorized broadcasting of portions of his work, out of context, which misrepresent his views and opinions; such a system denies him the right to decline licenses for broadcasts which may distort his book or article

cline licenses for broadcasts which may distort his book or article.

Even more dangerous, the Mathias-amendment compulsory licensing of literary works creates, for the first time, a dangerous precedent in the Copyright Act for other forms of government compulsion and control over the use of copyright literary works. There is no provision for compulsory licensing of literary works in the present Copyright Act, or in the other provisions of the Revision Bill. The CATV clause (Sec. 111) only allows the simultaneous retransmission of an overthe-air broadcast—an antennae function. It does not allow a cable system to use a literary work, or recording of it, to produce or originate a program. The Juke-Box and Record-license clauses (Secs. 115 and 116) deal only with nondramatic musical compositions, and only those previously recorded with the copyright owner's consent.

Public television can easily and adequately acquire rights to literary works under voluntary arrangements. Its interest in obtaining an absolute power of expropriation does not justify the establishment of a compulsory licensing system for literary works which completely violates the spirit of the First Amendment, and constitutes so dangerous a precedent for further encroachments. As the Supreme Court has emphasized, this is not an area for ad hoc balancing. The dangers of government compulsion on those who create and publish books and magazines are too great a threat. The Court has refused to tolerate far blander threats to freedom of expression, because of the dangerous precedents such toleration would create.

2. OTHER REASONS COMPULSORY LICENSING OF LITERARY WORKS FOR PUBLIC BROAD-CASTING SHOULD BE REJECTED

In our previous statements to the Subcommittee on Patents, Trademarks and Copyrights, we have discussed the many reasons why literary works should not

be subjected to compulsory licensing. Those reasons also are set forth in considerable detail in our joint July 10th statement to the House Judiciary Committee's Copyright Subcommittee. We summarize a few of them, briefly:

(i) The present law does not permit public broadcasters to produce recorded programs using literary works without the copyright owner's permission.

(ii) Authors now voluntarily grant licenses for readings from books and other literary works on public broadcasting at modest rates.

(iii) Compulsory licensing prevents the author from declining a license where he believes broadcasts of his work will diminish sales, destroy or impair motion

picture or television or recording rights, or damage its artistic integrity.

(iv) Compulsory licensing will deny authors and publishers the opportunity to negotiate reasonable compensation. Broadcasting of books cannot be licensed on a mass-basis, as can the performance of music. A musical composition can be performed countless times, on a non-exclusive basis by many different artists and orchestras. Its value and the author's compensation are equated with the number of performances. Literary works are used far less frequently in broadcasting. A book cannot be performed repeatedly to the same audiences (few books are read more than once); and the value of books vary widely, and cannot be equated with the number of performances.

(v) The licensing of literary works for broadcasting on a voluntary basis is now a simple process, and could be simplified even more under arrangements proposed by the Association of American Publishers, Authors League and other groups, making compulsory licensing of literary works totally unnecessary.

(vi) Public Television negotiates on a voluntary basis for all of its programming elements including motion pictures, plays, television programs produced by British TV or by domestic producers, and the services of its professional prod-

ucers, directors, writers, actors, technicians, etc.

For these and the other reasons discussed in our statements, the Authors League and Association of American Publishers submit there is no justification for establishing the compulsory licensing of literary works for public broadcasting.

> IRWIN KARP. Esq., The Authors League. CHARLES LIEB, Esq., The Association of American Publishers.

THE AUTHORS LEAGUE OF AMERICA, INC., December 8, 1975.

Memorandum B to: Hon. CHARLES McC. MATHIAS, Jr.

The Association of American Publishers and the Authors League oppose the compulsory licensing of literary works for public broadcasting, for reasons summarized in our accompanying statement. However, if such a compulsory system is enacted, the Association and League believe that certain essential safeguards and clarifications must be added to the statute, to protect authors and publishers whose works would be broadcast without their permission.

The Authors League and Association of American Publishers therefore urge that the following revisions be made in Sec. 118 and Chapter 8 of the Revision

Bill, should compulsory licensing be enacted.

1. Rate-Making for Literary Works. Reasonable royalties for literary works cannot be established on the same mass-licensing basis as rates for broadcasting of music. As noted in our accompanying memorandum, an individual author's compensation for broadcasts of a musical work, which is performed repeatedly to the same audiences, is normally based on surveyed performances; and the lump-sum payments by broadcasters to licensing societies are distributed to composers and audiences on that basis. However the same audience will not read a book repeatedly, or listen to several broadcasts of it. The value of a literary work's broadcast rights depends on its merits, its success and its author's reputation. Thus, the reasonable fee for broadcasts of some works will be substantially higher than the usual fee patterns for various categories of writings

that authors might ordinarily be willing to accept.

It is, consequently, essential that the Act permit the author or publisher of a literary work who so elects, to maintain a separate proceeding before the Tribunal to establish rates for various types of public broadcasts of his work. Otherwise, the copyright owner of a valuable and unique work would be grossly

undercompensated for such broadcasts.

- 2. The Author's Right to Prohibit Uses. We believe the damaging consequences of compulsory licensing make it essential that literary works not be subjected to such expropriation. Allowing an author to refuse uses is not sufficient to prevent all of these consequences; particularly the dangerous threat to freedom of ression inherent in the drastic expansion of the government's power over the author's work. However, if the compulsory licensing system is imposed on literary works, we submit that at a minimum, any author should be permitted to refuse permission for a particular use within one month after he receives written notice from a public broadcaster or producer of intention to broadcast the work. Moreover, an author should be permitted, in lieu of individual notices of refusal, to periodically file in the Copyright Office notice of his objection to public broadcasting use of specified works. No filing fees should be charged for such notices.
- 3. Reporting of Uses. Every public broadcaster should be required to file periodic reports with the Copyright Office, with a copy for the copyright owner, listing each broadcast of a copyrighted work, the type of program, the applicable royalty rate and other pertinent information. Without such reports, the copyright owner could not determine whether the appropriate royalty rate had been applied to specific broadcasts or whether royalty computations were correct.

4. Payment of Royalties. Royalty payments should be made to the copyright owner. If payments are made to the Copyright Office, each broadcaster should allocate the particular amounts due to each copright owner whose works it broadcasts.

5. Administrative Expenses. No portion of the expenses incurred by the Copyright Office in receiving or disbursing royalties should be charged to authors and publishers, who are opposed to compulsory licensing. Such charges would diminish or obliterate their royalties.

6. Notice of Use. Public broadcasters should be required to give an author or publisher notice of the production and broadcasting of programs u. 'is literary

works, within 30 days thereof.

7. Inception of Royalty Obligations. Public broadcasters should be obliged to pay royalties for all uses of literary works made from and after the effective date of the Revision Bill, at the rates subsequently fixed by the Tribunai.

- 8. Enforcement. A public broadcaster's failure to file reports, or the filing of false reports, should cancel its compulsory license, the copyright owner should be permitted to recover unpaid royalties and penalties, and damages for infringing uses.
- 9. Judicial Review. The various public broadcasting royalties and license terms set by the Tribunal must be subject to full judicial review, rather than the narrowly limited review provided in Sec. 809.

IRWIN KARP, Esq.,

The Authors League.

CHARLES LIEB, Esq.,

The Association of American Publishers.

Broadcast Music, *100., New York, N.Y., November 19, 1975.

Re: Public Broadcasting.

Hon. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Rayburn House Office Building, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: On July 10, 1975, the Subcommittee heard testimony on the proposed Mathias Admendment from all interested parties. I appeared on behalf of Broadcast Music, Inc. in opposition to the amendment. It is not my purpose to repeat any of the arguments advanced at that time. However, I wish to call the Subcommittee's attention to subsequent information which I request be included in the record of hearings.

Recently, the Register of Copyrights, the Honorable Barbara Ringer, submitted a statement in which she, among other things, summarizes the arguments advanced by public broadcasters in favor of the amendment. Point 1 summarizes the argument that public broadcasters cannot afford the payer at that would be requested by BMI and other music licensing organizations: "Public broadcasting is financed by public support and donations; it does not permit any commercial

exploitation."

Recent disclosures have made it quite clear that public broadcasting does, in fact, operate like commercial broadcasting and actively engages in commercial

exploitation.

I enclose an article which appeared in the New York Times dated Monday, November 3, 1975 with the headline "TV STATION CHASES MONEY AND RATINGS—IT'S CHANNEL 13". The article, by the distinguished reporter Les Brown, pointed out that public broadcasting uses ratings "to strengthen its appeals to corporations for program grants, somewhat in the manner that commercial broadcasters use ratings as sales tools". He also revealed that they engage in counter-programming "the technique used by commercial broadcasters of scheduling programs where they are likely to fare best against the competition".

He reported that since 40% of the funds come from private corporations which is "public television's form of sponsorship", there is the revelation that "the stat'on maintains a full-time department to work at securing corporate backing for proposed programs. Roughly equivalent to a commercial station's sales de-

partment, it, in fact, employs several former network salesmen."

I also enclose an article appearing in the New York Times on Thursday, November 13, under the heading "\$1.5 MILLION ADAMS SAGA OVERRUN SHAKES WNET". Thus, it appears that WNET had no difficulty in finding \$1.5 million to pay for costs which exceeded budget for one series. Much of this went into additional payments to personnel because of delays in programming and scheduling. I think this incident in itself destroys the credibility of the argument advanced by public broadcasters that they cannot afford to pay the composers and publishers of music, although they can pay everyone else involved in their productions.

I note for the record that on June 23, 1975 I wrote to Counsel for public broadcasting (copy attached) requesting relevant economic data which should include the costs incurred by public broadcasters for their productions. Despite the fact that the Corporation for Public Broadcasting and the Public Broadcasting System are quasi-governmental agencies, I have not received the information requested, nor have I had the courtesy of an acknowledgement of my request. The article on the cost overruns probably explains why I did not and will not receive

the information.

Although I reluctantly submit this information, I believe that it is relevant to those issues raised by the public broadcasters and, specifically, the argument summarized by the Register of Copyrights.

Sincerely,

EDWARD M. CRAMER.

[From the New York Times, Nov. 3, 1975.]

TV STATION CHASES MONEY AND RATINGS—IT'S CHANNEL 13

(By Les Brown)

As the noncommercial system, public television is often thought to have a natural exemption from the competitive and economic drives that rule other stations on the dial. But officials of public station WNET/13 were say that they are no less preoccupied with money and ratings than commercial broadcasters are—although in a quite different way.

The concern with money is inescapable for a station that lacks a stable financial base and whose operating budget this year exceeds \$30 million. But ratings—the demon of commercial television—would seem possible to ignore for a station

that was not striving to reach the largest possible audience.

In a wide-ranging interview with editors and reporters of The New York Times last week, the principal executives of WNET explained why they do choose to care about the Nielsen audience data and the station's competitive standing among other channels here.

A FORM OF FEEDBACK

For public television, they pointed out, ratings represent a form of audience feedback.

"On one level, they tell us how well we're executing what we want to do," said Robert Kotlowitz, vice president of programs for WNET. "Otherwise, we're

left with convincing ourselves that we have made all the right decisions for our audience."

Mr. Kotlowitz noted that in the case of "Monty Python's Flying Circus" the ratings revealed to the station that it has reaching a significant number of teen-agers for the first time and inticated how that segment of 'he audience might be continually served. In the case of the "Bach B Minor Mass," which got a surprising rating, "we made a discovery of what our public wants and scheduled more serious music," Mr. Kotlowitz said.

John Jay Iselin, president of WNET, justified the use of ratings in terms of cost-efficiency, saying "they give us a way of determining how well we're using

the funds we raise from the public."

He said also that they were used by the station to strengthen its appeals to corporations for program grants, somewhat in the manner that commercial broacasters use ratings as sales tools.

NOT DIRECTLY COMPETITIVE

Noting that WNET does not want to be directly competitive with commercial TV. Mr. Iselin said the station had set a goal of reaching 10 percent of the total audience with its programming. "If we were to achieve 20 percent, I think we could be accused of diluting the mix," he said.

(Last Tuesday, the PBS presentation of "The Incredible Machine," a National

Geographic special, drew 36 percent of the local audience.)

Mr. Iselin and Mr. Kotlowitz conceded that they also engaged in counterprogramming, the technique practiced by commercial broadcasters of scheduling programs where they are likely to fare best against the competition. Partly this involves studying the ratings of other stations for vulnerable spots.

"Menty Python" was moved from Sunday nights to Thursdays as a counterprogramming measure, they said, although acknowledging that it proved an unsuccessful maneuver. They also told of being tempted to schedule "Upstairs, Downstairs" directly opposite the CBS version of that British series, "Beacon Hill."

Asked if WNET was interested in carrying the reruns of "Beacon Hill," now that the series has been canceled, Mr. Kotlowitz stated. "Not even if it were offered free."

In discussing how program decisions are made at the public station, Mr. Kotlowitz, a novelist and former editor of Harper's magazine, said that essentially "one honors one's instincts for what is interesting and consequential to the extent that our funds permit."

"Ours will-always be a precarious venture because the quest for stable financing never ends," Mr. Iselin remarked.

"It costs us \$1.7 million a year just to turn on the transmitter," he went on. "Programs we'd like to put on the air get set aside because we can't find the funds for them. Too many people just don't understand that television—even public television—is very expensive."

Mr. Iselin indicated that to produce a simple 30-minute studio discussion in connection with a film (such as was done last week for "Last Grave at Dimbaza") costs around \$8,000.

Ethan Allen Hitchcock, chairman of the Educational Broadcasting Corporation, parent of WNET, offered a breakdown of the funding sources that showed that the station's share of the annual Federal appropriation for public television will cover only 5 percent of its expenses this year. The state's appropriation will cover 10 percent.

THE LARGEST PORTION

A large portion of the operational and discretionary program funds come from public subscription, but the greatest part-40 percent-is raised from private corporations for program underwriting, public television's form of sponsorship.

This has become an area of such importance that the station maintains a full-time department to work at securing corporate backing for proposed programs. Roughly equivalent to a commercial station's sales department, it, in fact, employs several former network salesmen.

Mr. Hitchcock, who has been spearheading the station's capital fund drive for its move into the Henry Hudson Hotel, where the city's public television center is being established, said that \$4 million remained to be raised of the \$10 million-needed.

He said the corporation's board has approved, in principle, the naming of the new center for the philanthropic donor who would cover the \$4 million balance.

THEY SPOKE TOO SOON.

Concerning the controversy at the station over the dropping of several local programs because of cost over-runs on the ambitious dramatic project for PBS, "The Adams Chronicles," Mr. Iselin said, "We were perhaps hasty in announcing programs we thought we had the money for."

He noted that it was not uncommon for major motion picture or TV produc-

tions to exceed their budgets.

Estimates at WNET are that "Adams Chronicles" has gone more than \$1.5 million over budget. When this was discovered late in September, the station's nianagement withdrew the proposed nightly program "Round Table" and the

journalism series "Behind the Lines" and cut back other programs.

Asked why the price for the over-runs had to be paid in cultural and public affairs shows, Mr. Iselin explained that they were produced out of discretionary funds and that those were the only funds the station could draw from to meet the deficit for "Adams Chronicles."

[From the New York Times, Nov. 13, 1975.]

\$1.5 MILLION ADAMS SAGA OVERRUN SHAKES WNET

(Bý Les Brown)

Massive overtime payments to crews working against a tight deadline, unexpected costs in maintaining historical authenticity, inflation and some pilferage all combined to create a \$1.5 million cost overrun in the production of "The Adams Chronicles," WNET's ambitious Bicentennial series, an examination of the expense records has revealed.

The overrun is at the heart of a controversy surrounding WNET that some feel is threatening the administration of John Jay Iselin, president of WNET since

1972.

Ironically, it is occurring at a time when the station is enjoying probably its most prosperous year. While other cultural institutions here are suffering the effects of the city's financial crisis or of the uncertain general economy, WNET is on its way to amassing record public contributions and has raised its largest budget ever—more than \$30 million—for the current fiscal year.

Its ratings are also on the rise, indicating growing viewer acceptance of the

programming.

But in a period when accolades might normally be in order, Mr. Iselin's stewardship is under fire by a body of critics, spurred on by dissidents on the WNET staff, who are charging him with concentrating on national productions at the expense of local public affairs programming and charging his organization with squandering funds.

Since the merge, of Channel 13 with National Educational Television in 1970, WNET has been both a local station and a major production agency for the national public television system. This duality has been the source of friction within WNET in the past, when priorities have seemed to lean in one direction or the

other.

The latest brouhaha erupted in September, when Mr. Iselin withdrew two proposed local series that had not yet gone into production—"Roundtable" and "Behind the Lines"—and made cutbacks in others in order to meet the \$1.5 million deficit of "Adams Chronicles."

With "Adams Chronicles," WNET admittedly intends to prove that it can turn out a television series as dramatically engrossing, as fastidiously historical and as expertly mounted as the most celebrated productions from Britain have been.

EXPENSES JUNED

The project, a 13-week series for PBS that traces the history of the family descended from John Adams through 150 years, is supported by grants totaling \$5.2 million from the National Endowment for the Humanities, the Mellon Foundation and the Atlantic Richfield-Corporation.

Why the cost overrun was not forecast during the summer, when there was still time to keep expenses in check, and why there were no safeguards against it are questions being raised by critics of WNET's management. Another is how the \$1.5 million came to be spent over and above the original allocation.

Interviews with numerous persons involved with "Adams Chronicles" indicate that production expenses jumped out of control when the project fell seriously behind schedule in August, and all efforts were bent to meet deadlines for taping.

"We were backed up against a commitment to an air date and a series of production delays. Between them, they make an accordion," remarked Virginia Kassel, creator of the project and producer of the series.

The series is scheduled to go on the air Jan. 20 and is now in the postproduction phase, which involves cutting, editing and the addition of sound and music.

According to financial estimates of the station, as much as \$800,000 of the overrun went to overtime and "golden time" pay for scores of union personnel during the frenzied period, as the production spilled into weekends and gave itself to 18-hour work days.

"They suddenly found themselves playing in the big leagues with a minor league orientation," said a representative of a labor union associated with the

With one program episode in rehearsal while another was before the cameras, each delay—whether for illness, the slowness of a director, the lateness of scripts or revisions in scenic design—sent labor costs into geometric patterns of increase.

There was also large amounts spent, beyond original expectations, for customing make-up and props to maintain impeccably the historical accuracy of the series. Bone china and authentic silverware were used for dining scenes, for example. Those costs, along with location travel expenses and extra office and staff costs, came to an estimated total of \$300,000.

Around \$7,000, but possibly more, was lost to the pilferage of properties rented from antique shops. According to sources involved with the production, the feverish rush toward deadline made it impossible to keep close watch on the props. and some could not be found when they had to be returned.

"There was a fantastic amount of work to be put out in the latter part of the series. Time was very valuable, and there was a question of what the priorities should be," said Bob Spitzer, production manager of "Adams Chronicles."

"It wasn't management's fault that the overage was not discovered until we were down to the last three days," he went on.

"NO SAFEGUARDS"

Mr. Iselin says the budget was set excessively low in the first place and had been submitted before inflation. "The project was designed to be done without overtime," he said. "We had no safeguards, no contingency line in the budget, as movies and other major productions have, because the National Endowment for the Humanities doesn't allow it. For the budget to work, everything had to come together precisely on time and they didn't."

At that, Mr. Iselin contended, the cost of the series will not be inordinate, even with the overruns. The individual episodes will average \$400,000 each, which is comparable to what commercial networks pay for productions as opulent as

"Adams Chronicles," he said.

A check with programming and business affairs executives at the networks bore out Mr. Iselin. "It's right on target," said a CBS executive, although he noted that public television receives special considerations from certain unions, such as those

representing actors, that should have contributed to somewhat lower costs.

Miss Kassel attributed the disruption of the "Adams Chronicles" timetable largely to a 7-week strike against WNET by Writers Guild of America, East, last fall. The slowdown in scripts that resulted was complicated by the fact that each

had to be scrutinized for accuracy by an advisory board of historians.

George Marketos, treasurer of WNET, explained why the cost overruns had to be met with the funds from proposed local programs. "Unlike commercial companies, we don't have accumulated surpluses to cover such deficits." he said. "We might have gone to banks for a long-term loan, but we consider it bad policy to borrow in order to finance our operation. Look at New York City. All we could do was draw from local discretionary funds, those we had hoped to put into programs."

PROCEDURES ALTERED

Mr. Marketos pointed out that during the previous fiscal year WNET exceeded its budget for all shows by only 0.6 percent. He said the station has altered procedures as a result of "Adams Chronicles" so that unit managers of all programs now report to the finance department, where a group of production controllers have been set up to oversee the budgets.

Despite the overage for "Adams Chronicles," the series will not have exceeded the \$5.2 million grant for it by very much. This is because the station had deducted \$1.4 million from the original grant for overhead, to cover administrative and sales costs, as is customary in public television. The actual production had been budgeted a \$3.8 million.

The station, meanwhile, has given assurances that "Behind the Lines" and "Roundtable" were only postponed and that they would be revived when there are

funds for them.

When members of the staff learned of the removal of the local cultural and public affairs series to help cover the deficit for "Adams Chronicles," staff producers called for a meeting with Mr. Iselin and other officials.

According to several members of the staff, the meeting went extremely well

and helped to restore morale in the company.

"The morale problem was over a general lack of communication with management and was not restricted to the 'Adams' fiasco. That was just a catalyst," said one veteran producer, who asked not to be identified.

He added that Mr. Iselin had answered questions adroitly and won a new vote

of confidence from the staff.

But the producer, reflecting the views of others at the station, went on to say that Mr. Iselin is so busy with outside contacts, necessary for the financial well-being of the station, that "he has left a vacuum of leadership inside."

"This leaves great freedom for producers. The autonomy is wonderful," he

said. "But when things go wrong, they can get seriously out of hand."

Broadcast Music, Inc., New York, N.Y., June 23, 1975.

Eugene N. Aleinikoff, Esq., Dag Hammarskjold Plaza, New York, N.Y.

DEAR GENE: We are hopeful that negotiations for an agreement with you and

your client can be further pursued.

From BMI's point of view there is only one issue that separates us and that is money. We feel that other issues either are not really problems, or can easily be resolved once the compensation matter is settled.

This was our position at the last meeting in Washington on May 28th and it is

still our position.

To facilitate a determination of what an appropriate compensation rate should be for BMI (as well as other music copyright interests) we deem it appropriate to be furnished certain data on what public broadcasting is paying to other suppliers of goods and services. In this way we can avoid setting a fee which is not

based upon any guidelines.

Specifically, what does public broadcasting pay for talent, both at the network and the local station level, and how does this compare with amounts paid by commercial broadcasters? What is paid to musicians and members of other unions, and how do these amounts differ with comparable payments by commercial broadcasters? Similar data for production costs for musical and non-musical programming would also be helpful, as would be the differential paid to the telephone company by public broadcasting as compared to other broadcasters. The above is illustrative of the type of information which would be meaningful in helping to arrive at a fair rate.

If you can arrange to collect as much of this information as is readily available, then we can meet and come to a prompt agreement as to a fair rate and

any other outstanding issues.

As we said at the outset, we are hopeful that negotiations can be further pursued and we (as well as the other copyright interests) are prepared as always to work with you toward concluding a prompt agreement.

Sincerely,

EDWARD M. CRAMER.

Computer & Business Equipment Manufacturers Association Washington, D.C., November 6, 1975.

Hon. ROBERT W. KASTENMEIR,

Chairman, Subcommittee on the Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: CBEMA represents the computer and business equipment manufacturing industry. We offer these comments and recommendations

concerning H.R. 2223, the proposed General Revision of the Copyright Law, that is pending before your Subcommittee. Ms. Barbara Ringer, Register of Copyrights, in her statment of October 9 discussed copyright of computer software. We have examined her statement on this issue and ask that you consider the enclosed comments. We would be pleased to provide any additional information

or comments concerning this proposal as may be helpful.

CBEMA concurs in Register Ringer's statement before your Subcommittee to the effect that, "a careful reading of the bill, together with the 1967 and, especially, the 1974 reports, make clear an intention to include computer programs or 'software' within the subject matter of copyright." We also agree with Ms. Ringer that the Congressional intention might be made more clear, and, in the pursuit of such clarity, recommend that H.R. 2223 expressly provide that computer "software" have copyright protection and that a level of protection be extended computer "data bases." The present Copyright Law was written decades before the advent of the modern programmable computer. As acknowledged by current Copyright Office practice, an appropriate interpretation of the present law is to provide Copyright protection to computer programs since they logically fall within the copyright concept as literary works. With this general revision of the law, it is appropriate that express provisions in the statute extend copyright protection to the "software" facets of this dynamic new technology.

The purpose of the CBEMA amendments to H.R. 2223 is to place computer programs in the same context as the traditional creative "works" to which copyright protection has always applied making whatever other secondary adjustments in the language of the bill as are necessary to accommodate any unique characteristics of computer software. Accordingly, CBEMA requests consideration of its following recommendations that H.R. 2223 be amended to

expressly provide:

(1) Explicit protection of computer programs and data bases.

(2) Rights with respect to inputting data bases and computer programs into a computer.

(3) Limiting preemption effects, including effects of presence of copyright notice on unpublished materials and/or compliance with deposit requirements.

(4) Increasing criminal penalties for data base and computer program copyright infringement.

(5) Manufacturing rights in country of writing. (6) Clarification of function of deposit copies.

(7) Title in deposit copies.

(8) Freeing Government Contractors from possible criminal sanctions.

(9) Stricture against systematic or concerted photocopying.

These CBEMA comments are more fully set forth on the attached "CBEMA Position on Copyright Revision Bill, H.R. 2223." There is first a statement regarding the specific CBEMA position on the items enumerated above. Next, the position paper provides background comments, in corresponding order, to reflect the underlying rationale of CBEMA.

You will also find attached for your added convenience, reproductions of selected pages of Bill H.R. 2223 which set out the amendments that CBEMA believes would clarify and strengthen the pending legislation. Specifically, H.R. 2223, pages 1-3, 5-6, 8, 27, 33, 42, 49, 51, and 55 are reproduced.

A review of all of the amendments proposed in each section of H.R. 2223 is

provided in the attachment labeled "Section Analysis."

CBEMA advocates its position, not only because its members are active creators and manufacturers in the informational and computer arts, but also because it believes that American society itself will be directly benefited from the stimulus that will result. By assuring protection of investment in computer programs and data bases, American entrepreneurs will be encouraged to invest their capital and bring forth new products. New products will not only satisfy public wants, but also provide employment and exports to strengthen the U.S. balance of trade.

CBEMA urges prompt passage of the Copyright Revision Bill, H.R. 2223, along with the amendments thereto suggested herein. We appreciate this op-

portunity to present the views of our industry.

Very truly yours,

"CBEMA Position on Copyright Revision Bill H.R. 2223"

1. CBEMA favors clarification of the Bill to provide specifically for the adequate copyright protection of data bases and computer programs.

2. CBEMA favors amendment of the Bill to specify that the unauthorized inputting of a data base or computer program copyrighted work into a computer

is a copyright infringement.

3. CBEMA recommends that the Bill be amended to exempt explicitly from the preempting of rights in the nature of copyright, activities in violation of both trade secrets and misappropriation doctrines. In line with this, CBEMA believes the Bill should be further amended so that the mere application of a copyright notice to material and/or compliance with the deposit requirements of the Act are not automatically destructive of the non-preempted rights.

4. CBEMA recommends that the criminal penalties for infringement of data bases and computer programs, be increased to the level provided in the Bill for

the infringement of sound recordings.

- 5. CBEMA recommends that the requirement that a work consisting preponderantly of non-dramatic literary material that is in the English language must be manufactured in the United States or Canada to have the full benefit of copyright, be liberalized to extend the right of manufacture to all countries wherein the work is created.
- 6. CBEMA recommends that the Bill state the function for which a copyright deposit copy is retained by the Copyright Office is for "the purpose of reference by the Library of Congress" rather than for "the use or disposition of the Library of Congress."
- 7. In line with the preceding recommendation, CBEMA recommends that the proposed Bill provide merely for the *custody* by the United States Government of deposit copies rather than that they become the *property* of the United States Government.
- 8. CBEMA recommends that the Bill specifically provide that its criminal sanctions shall be of no force and effect as to any contractor who provides the Government with an infringing work under the authorization or consent of the Government.
- 9. CBEMA opposes any interpretation of "fair use" which would authorize systematic or concerted photocopying of copyrighted works.

Background comments on the proposed CBEMA statements are respectively as

1. The specific recitation of the copyrightability of data bases and computer programs, and of the scope of protection accorded each of these new technology information products is necessary because of the generic nature of the Bill and the need for the pending legislation and its legislative history to address these new technologies adequately.

Data bases and computer programs undoubtedly qualify as writings of an author in being elaborate, original and highly orchestrated, intellectual and technical achievements. They entail significant creation cost. But no court decision to date is known to have established firmly that they are within the ambit of the existing Copyright Law provisions. For example, the general terms of the proposed Copyright Revision Bill do not ensure an interpretation that computer programs will be construed to fall within the subject matter of the Bill though there is a legislative history indicating that computer programs are intended to be covered within the Bill. Consequently, it can be appreciated that the Bill may not adequately address the scope of protection to be accorded these new technological developments.

To insure the copyrightability of computer programs, it is proposed that they be identified as a separate work of authorship under Section 102 .(Alternatively, the definition in Section 101 for literary works might be amended to include computer programs.) A suggested definition of computer programs is proposed for

Section 101.

The scope of exclusive rights in a computer program must include the separate exclusive right to reproduce the program within the computer, just like the scope of exclusive rights in a play includes the separate exclusive right to perform the drama publicly. A new subsection, 118(a), is proposed for a delineation of such a right. Per the new subsection, the possessor of a physical copy of the program would not automatically be entitled to reproduce it in a computer. He would need a license, express or implied. Through this separate right the recovery of the cost of program creation could be spread over many users rather than limited

to a few. Without this separate right media such as magnetic tape or punched cards, might be passed from user to user as soon as each user had read it into the

permanent storage element of his computer.

The adequate protection of a program requires more than the mere protection against copying of the code itself. Considerable effort and expense are spent in working out the sequence of events or steps (operations) that a program will follow and in selecting the processes to carry out the various individual steps. Now it is understood that subsection 102(b) is included in the Bill to ensure that copyrighting of programs is not somewhat the equivalent of patenting its system concepts. There is no quarrel with this. And while we note that this subsection "in no way enlarges or contracts the scope of copyright protection" we do not believe that the "expression adopted by the programmer" should be accorded any narrower definition than is generally accorded any other writing. Thus, the expression of a programmer should be deemed to include that level of abstraction that Judge Leerned Hand had in mind when he stated in Nichols v. Universal Pictures, 45 F.2nd 119, 20 C.O.Bull 528 (2 CCA 1930), the following: "Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected since otherwise the playwright could prevent the use of his "ideas'," to which, apart from their expression, his property is never extended." We are not suggesting that actual process or methods embodied in a program be copyrightable; however, we believe that the arbitrary aspects of collections and patterns of events and processes that reflect the programmer's unique personality should be copyrightable. Collections and patterns of events and processes that are mandated by the result to be accomplished, that is, are function driven, should be beyond the ambit of copyright law.

To ensure the copyrightability of data bases, it is proposed that they too be a identified as a separate work of authorship under Section 102 of the Bill. An

appropriate definition has been inserted in Section 101.

A limited right would be given to the copyright proprietor of a data base. This limited right would be the right to perform a search of the data base. Accordingly, Section 106 of the Copyright Bill is amended to include the following statement: "In the case of data base works, to perform a search of the copyrighted work." Section 101 of the Bill is amended to include a definition for "search of a data base." Since Register Ringer in her statement of October 9, 1975, points out that CONTU's mandate does not include the question of software protection, we arge that the proper interpretation of the "expression" of the

programmer be made clear.

2. Control of the unfair utilization of a data base or computer program work in a computer, can best be effected by giving the author or copyright proprietor the exclusive right to input such copyrighted work into a computer. This control would be effected by amending Section 106 to include that the owner of copyright has the exclusive right "to read into, to store or reproduce for storage in a computer." This amendment of Section 106 is accompanied by an exception making amendment of Section 117. (Section 117 has as its objective to maintain the status quo with regard to computer input as of the time prior to the passage of the Bill.) While computer input may be a subject to be recognized by the recently created National Commission, we believe the law proposed for data bases and computer programs is correct and its passage need in no way impede evaluation of other items by the Commission.

3. Paragraph 3 of subsection (b) of section 301 of the Bill recites several "not equivalent" to copyright rights which are not preempted by the Bill. To avoid any interpretation that activities violating other rights do not include the unnamed activities violating trade secrets and misappropriation doctrines, the terms "violation of trade secret" and "misappropriation" have been inserted in the

paragraph 3.

It is uncertain what effect the presence of notice on unpublished materials and/or deposit of copies in the Copyright Office can have upon the non-equivalent rights involving activities such as breaches of trust, violation of trade secrets, and the invasion of privacy. To eliminate this uncertainty, the sentence as marked at the end of paragraph 301 (b) (3) is suggested.

4. Data bases and computer programs entail significant economic investment equal to if not exceeding that of sound recordings. Accordingly, the same pro-

tection given sound recordings should be achieved by inserting the words "computer programs, data bases, or" before "sound recording" in line 8 of subsection

(a) of Section 506 of the Bill.

5. Extension of the right of manufacture so that English works created in another country could conveniently be produced in distribution form therein, would merely allow the work to be manufactured where it was written. Thus, if a domestic corporation were to have its United Kingdom branch write a document which is equally usable in England and in the United States, it would only seem fitting and proper that such document be printed and distributed from the United Kingdom by the original development group if that is the most socially economic way of doing business. Such situations are to be distinguished from those where an American publisher merely shops around for where the document can be most economically printed. This provision could be written into the Bill by amending the end of subsection (a) of Section 601 to read additionally: "or were written in the country in which they have been manufactured."

6. The Copyright Bill as presently worded would enable the Library of Congress to make any use or disposition of the deposit copies. Does this include the right to distribute a computer program to another Government agency for incorporation into a computer? Or to distribute a data base composition to another Government agency for their use of it in lieu of a purchased one? Since it is understood that the Library of Congress merely requires deposit copies in order to maintain its reference library, it is proposed that the words "for the use or disposition of the Library of Congress" in subsection (b) of Section 407 to be amended to read: "for the purpose of reference within the Library of Congress."

7. If a person has title to a copy of a copyrighted work, his rights of utilization and disposition may be greater than if he merely 's a bailee. Considering the position of the previous item, it is proposed that the Government should not receive title to the deposit copies, rather merely a right of custody. This would be achieved in the Bill by amending the last line of subsection (a) of Section 704 by substituting the words "in the custody" for the phrase "the property." Subsection 704(b) would be amended to delete the phrase ", or for exchange or transfer to any other library," and to substitute the word "only." Hence, the Library of Congress would not be authorized to distribute deposit copies to the detriment of the depositor's markéting efforts.

8. 28 U.S.C. 1498 provides that the exclusive remedy of the owner of a copyright infringed by a contractor acting for the Government with the authorization or consent of the Government, is against the Government. This does not say that the contractor did not commit an act for which it might be liable to prosecution. Elimination of this exposure would be accompanied in the Bill by adding to the end of subsection (a) of Section 506, the following sentence: "The criminal sanctions of this Subsection shall be of no force and effect as to any person who provides the Government with an infringing work or phonorecord, provided the

Government exercises its rights under the provisions of 28 USC 1498."

9. The opposition to any interpretation of "fair use" which would authorize systematic or concerted photocopying or copyrighted works is primarily intended to offset any possible enlargement of the holding of "fair use" by the Court of Claims in Williams and Wilkins v. U.S., 180 USPQ 49 (November 27, 1973), which was affirmed by an equally divided U.S. Supreme Court on February 25, 1975, CBEMA endorses the since inserted subsection (g) of Section 108.

"SECTION ANALYSIS OF ITS PROPOSED AMENDMENTS TO H.R. 2223"

SECTION 101

Definitions are proposed for computer programs, data bases, and search of a data base

An amendment of the definition for "A work is fixed" is proposed to insure that the momentary and transient storage of data bases and computer programs in the main (interior) memory of a computer constitutes a copying, storing, or reproduction thereof. There has been some comment in the literature that the copying of a copyrighted work into the main storage element of a computer might not be an infringement, because the recorded state of a copyrighted data base or program in main memory (and some other computer storage elements) might only obtain for a few microseconds. As presently written in the Bill, it is believed that the definition intends among other things for an immediately self-decaying embodiment not to be a fixation. Storage in main memory is not self-decaying

in a whole storage element sense, though the recordings in the components of some computer storage elements are automatically refreshed internally. Storage in main memory is normally erased or replaced only upon specific instruction. Such recordation in main memory is, thus, non-evanescent and sufficiently permanent or stable to permit it repeatedly to be perceived, reproduced or overwise communicated. Thus, the definition for "A work is fixed" is so amended while striking the words "for a period of more than transitory duration." It is believed that such amendment does not change the basic intent of the definition while making clear that the recordation in the main sociage element of a computer would be the making of a copy. Such protection is needed, for example, where a data base or computer program is "borrowed" and brought into a computer over telephone lines, and promptly erased after a few microseconds of presence.

SECTION 102

Subsection (a) would be amended by adding as reparate categories of works of authorship the following:

8. Data Bases

9. Computer Programs

SECTION 106

The first amendment involves the insertion in item 5 of "data bases and computer programs" to accord the copyright owner thereof the exclusive right to display them publicly.

A new item 6 would provide a special exclusive right for data base works.

A new item 7 provides an exclusive right to read into, to store or to reproduce for storage in computers, in the case of data base and computer program works. It does not address all copyrighted works and leaves this matter for the attention of the National Commission.

SECTION 117

The proffered amendment would make an exception to the intended status quo effect of Section 117. It would insure that the owner of copyright in a data base or a computer program work would not have nullified his proposed right with respect to the use of the work in conjunction with computers.

NEW SECTION 118

This Section would especially stress the scope of exclusive rights in computer programs. Subsection (a) would make it an infringement of copyright for the possessor of a computer program to make a copy thereof by reproducing it in a computer unless authorized by the copyright owner. The intention of the subsection is to deny the mere possessor of a computer program the right to copy it into a computer. This is not to say that he may not have a relationship with the copyright proprietor such as to provide him with an implied license to do such nor that he may not have an express license to do such; however, absent such licenses he would only be able to use it. Thus, he would be like the purchaser of a book on a play; he may read it, but not put on a stage the play absent some authorization from the copyright owner.

Subsection (b) provides that the copyright status of the result of the execution of a program will be that of a derivative work of the information (which may be a program, including itself) processed or modified by the executing program and its ancillary programs. The intention is to make clear that the result of executing a program will normally not be subject to the copyright in the program. If it is subject to any pre-existing copyright, it will be that of the information or data processed by the program.

Subsection (c) provides definitions for special terms relating to computer programs, to-wit, "a computer" and "a flow chart."

SECTION 301

Paragraph 301(b)(3) would be amended to include violation of trade secrets and misappropriation, as activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106. This is to insure that application of the maxim Expressio unius est exclusio alterius, does not preclude availability of the rights to an author.

A sentence would also be added to the end of Paragraph (b) (3) to limit the adverse effects of the presence of copyright notice on unpublished materials

and/or of compliance with the deposit requirements, upon "non-equivalent rights."

SECTION 407

Subsection (b) is amended to limit the use that might be made by the Library of Congress of deposited works. Items such as data bases and computer programs are costly and the use thereof for purposes other than reference within the Library of Congress would substantially impact the opportunities for investment recovery by the author, particularly considering the limited quantities in which they are marketable.

SECTION 506

Subsection (a) would be amended to provide for computer programs and data bases, the same criminal penalties that are available for sound recordings. The items added entail a financial investment that is at least equal to that for sound recordings.

A sentence would be added to the end of Subsection (a) to eliminate the exposure of a Government contractor operating under the provisions of 28 U.S.C. 1498 to the possible commission of a criminal act and prosecution therefor.

SECTION 601

Subsection (a) would be amended by adding words at the end thereof to permit the importation or public distribution of non-dramatic literary material in English that is manufactured in the country in which it is written. Administrative and economic considerations normally suggest that the work be printed where it is written.

SECTION 704

Subsection (a) would be amended to specify that deposit copies are in the custody of, rather than the property of, the United States Government. Title would thus be left in the author and the Library of Congress' rights of utilization and disposition limited to that of a bailee. Again, the intention is to limit the use that may be made of expensive deposit copies.

Subsection (b) would be amended to drop the provision for the exchange or transfer of deposit copies.

[H.R. 2223, 94th Cong., 1st sess.]

A BILL For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I-GENERAL REVISION OF COPYRIGHT LAW

SEC. 101. Title 17 of the United States Code, entitled "Copyright", is hereby amended in its entirety to read as follows:

TITLE 17—COPYRIGHTS

§ 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no

natural person is identified as author.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress deter-

mines to be most suitable for its purposes.

A person's "children" are his immediate offspring, whether legitimate or or not, and any children legally adopted by him.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work

of authorship. The term "compilation" includes collective works.

A "Computer Program" is a work that consists of a series of instructions or statements which are prepared in order to achieve a certain result, regardless of the nature of the material object such as documents, punched cards, magnetic tapes or disks, or computer storage elements, in which the work is embodied. A computer program can be a derivative work of a flow chart, and either may be a derivative work of a Literary Work.

'Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner," with respect to any one of the exclusive rights com-

prised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions constitutes a separate work.

A "data base" is a work which is a compilation expressed in a form intrinsically intended for use in conjunction with automatic systems capable of storing, processing, retrieving or transferring information or in conjunction

with any similar device, machine or process.

A "derivative work" is a work based upon one or more prexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

"device," "machine," or "process" is one now known or later developed.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images

nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is non-evanescent and sufficiently permanent or stable to permit it repeatedly to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The terms "including" and "such as" are illustrative and not limitative. A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works other than audiovisual works, * * *.

A "search of a data base" is the examination or analysis of a data base by a computer for particular information relevant to an inquiry, whether or not the examination or analysis results in any display, copy or performance of all or part of the data base, and whether or not the inquirer received it in the same place or in separate places or at the same or at different times.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audio isual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they

are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate,

has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from

which they are sent.

The "United States," when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article."

The author's "widow" or "widower" is the author's surviving spouse under the law of his domicile at the time of his death, whether or not the spouse has later remarried.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of his official duties.

A "work made for hire" is:

(1) a work prepared by an employee within the scope of his employment: or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, as a photographic or other portrait of one or more persons, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. A "supplementary is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations. maps, charts, tables, editorial notes, musical arrangements, answer material for tests, vibliographies, appendixes, and indexes. An "instructional text" is a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities.

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;(2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;(6) motion pictures and other audiovisual works;
- (7) sound recordings;
- (8) data bases:

(9) computer programs.

(b) In no case does copyright protection for an original work of authorship extent to any idea, plan, procedure, process, system, method of operation. concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 117, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work;(3) to distribute copies or phonorecords of the copyrighted work to the

public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, data bases, and computer programs, to display the copyrighted work publicly.

(6) in the case of data base works, to perform a search of the copyrighted

work;

(7) in the case of data base and computer program works, to read into, to store or reproduce for storage the work in automatic systems capable of storing, processing, retrieving, or transferring information, or in any similar device, muchine or process.

§ 117. Scope of exclusive rights: Use in conjunction with computers and similar r information systems

Notwithstanding the provisions of sections 106 through 116, this title does not afford to the owner of copyright in a work other than a data base or a computer program any greater or lesser rights with respect to the use of the work in conjunction with automatic systems capable or storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine, or process, than those afforded to works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1976, as held applicable and construed by a court in an action brought under this title.

§ 118. Scope of exclusive rights in computer programs

(a) Effect of obtaining possession of a copy of a computer program notwith-standing the provisions subsections (a) and (b) of § 109; it is an infringement of copyright for the possessor of a computer program to make a copy thereof by reproducing it in a computer unless authorized by the copyright owner.

(b) The copyright status of the result of the execution of a program will be that of a derivative work of the information (which may be a program) proc-

cssed or modified by the executing program and its ancillary programs.

(c) Definitions—As used in this section, and in Sections 101, 102, 106, and

117, the following terms and their variant forms mean the following:

(1) A "computer" is any automatic system capable of storing, processing, retrieving, or transferring information, or any similar device, machine or

(2) A "flow chart" is an annotated graphical representation in which symbols are used to represent the sequence of operations in a program or a proposed program.

§ 301 Pre-emption with respect to other laws

(a) On and after January 1, 1977, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the

common law or statutes of any State with respect to:

(1) unpublished material that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression;

(2) any cause of action arising from undertakings commenced before January 1, 1977;

(3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including breaches of contract, breaches of trust, violation of trade secrets, misappropriations, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation. The mere application of copyright vice to material analor compliance with the deposit requirements of this title shall not be destructive of any such "not equivalent" rights.

§ 407. Deposit of copies or phonorecords for Library of Congress

- (a) Except as provided by subsection (c), the owner of copyright or of the exclusive right of publication in a work published with notice of copyright in the United States shall deposit, within three months after the date of such publication:
 - (1) two complete copies of the best edition; or
 - (2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords.

This deposit is not a condition of copyright protection.

- (b) The required copies or phonorecords shall Le deposited in the Copyright Office for the purpose of reference within purpose of reference within the I brary of Congress. The Register of Copyrights shall, when requested by the depositor and upon payment of the fee prescribed by section 708, issue a receipt for the deposit.
 - (c) The Register of Copyrights may by regulation exempt any * * *.

§ 506. Criminal offenses

(a) CRIMINAL INFRINGEMENT.—Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be fined not more than \$2,500 or imprisoned not more than one year, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned not more than three years, or both, for any subsequent offense, provided however, that any person who infringes willfully and for purposes of commercial advantage or private financial gain the copyright in a computer program, data base, or sound recording afforded by subsections (1) and (3) in section 106 or the copyright in a motion picture afforded by subsections (1), (3), and (4) in section 106 shall be fined not more than \$25,000 or imprisoned for not more than one year, or both, for the first such offense and shall be fined not more than \$50,000 or imprisoned not more than two years, or both, for any subsequent offense. The criminal sanctions of this Subsection shall be of no force and effect as to any person who provides the Government with an infringing work or phonorecord, provided the Government exercises its right under the provisions of 28 USC 1498.

Chapter 6.—MANFACTURING REQUIREMENT AND IMPORTATION

Sec.

601. Manufac. , importation, and public distribution of certain copies.

602. Infringing importation of copies or phonorecords.

603. Importation prohibitions: Enforcement and disposition of excluded articles.

§ 601. Manufacture, importation, and public distribution of certain copies

(a) Except as provided by subsection (b), the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been nanufactured in the United States or Canada or were written in the country in which they have been manufactured.

(b) The provisions of subsection (a) do not apply:

(1) where, on the date when importation is sought or public distribution in the United States is made, the author of any substantial part of such material is neither a national nor a domiciliary of the United States or, if he is a national of the United States, has been domiciled outside of the United States for a continuous period of at least one year immediately preceding that date; in the case of work made for hire, the exemption provided by this clause does not apply unless a substantial part of the work was prepared for an employer or other person who is not a national or domiciliary of the United States or a domestic corporation or enterprise;

(2) where the Bureau of Customs is presented with an import statement issued under the seal of the Copyright Office, in which case a total of no more than two thousand copies of any one such work shall be allowed

entry; the import statement shall be issued upon request to the copyright owner or to a person designated by him at the time of registration for the work under section 408 or at any time thereafter;

(3) where importation is sought under the authority or for the use, other than in schools, of the government of the United States or of any State or political subdivision of a State;

(4) where importation, for use and not for sale, is sought:

(A) by any person with respect to no more than one copy of any one work at any one time;

(B) by any person arriving from abroad, with respect to copies forming part of his personal baggage; or

§ 704. Retention and disposition of articles deposited in Copyright Office

(a) Upon their deposit in the Copyright Office under sections 407 and 408, all copies, phonorecords, and identifying material, including those deposited in ction with claims that have been refused registration, are the property in the ody of the United States Government.

b) In the case of published works, all copies, phonorecords, and identifying material deposited are available to the Library of Congress for its collections only or for exchange or transfer to any other library. In the case of unpublished works, the Library is entitled to select any deposits for its collections.

THE CONSUMER COMMITTEE ON COPYRIGHT, Potsdam, N.Y., October 15, 1975.

Hon. Robert W. Kastenmeier, U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: Very shortly you will begin your markup hearings on the Copyright Revision Bill, H.R. 2223. Our committee, which includes voters from your state, is a group of private citizens who have banded together with a common cause to ensure that the Copyright Revision Bill's primary principle, to benefit society at large, is not lost to the interest of big business.

One observer on copyright stated the matter aptly in these terms: "For the general good of the world, therefore, whatever valuable work has once been created by the author, and issued out by him should be understood as no longer in his power, but as belonging to the public; at the same time the author is entitled to receive an adequate reward."

Past legislative history should give you the clearest proof that public benefit is the true theory of our copyright laws. Twelve of the original thirteen states passed copyright acts before the Federal Constitution was adopted. Nearly all the titles of these acts were phrased in the term of the general welfare. The Connecticut act was called, "An act for the encouragement of literature and genius". New York passed "An act to promote literature". And, a Massachusetts act said, "For the benefit of mankind".

The past American copyright scheme shows a paradox implicit in all copyright protection. Creations of the mind are peculiarly a man's own, yet in the public interest they must be taken away after publication, with proper rewards to the author, to encourage him to create more works of art for the public.

The question you should ask yourself is, does H.R. 2223 follow this tradition? It is our committee's view that this bill does not. The primary purpose of this bill is to ensure the continuing monopolization of the copyright field by a few giant corporations. Bill H.R. 2223, because of present industry trade practices, takes man's creations after publications, with little guarantee for any rewards, and gives them to the large copyright conglomerates. These conglomerates, in turn, keep them from the public, until their price is met.

Bill H.R. 2223 will also give the conglomerate these rights for life + 50 years of the author or creator. It should be pointed out that the first English copyright was for a period of 14 years (The Statute of Anne, 1709). As the copyright cartel grew, the number of years of copyright duration also increased. The reason for longer copyright duration has decreased. In 1909, the term was set at 28 + 28 years. The methods for exposure of new books, sheet music, and records were then very crude; it took a long time for recognition of a work, with an equal length of time to distribute it nationally.

Now in 1975, when an author can obtain recognition almost immediately thru radio and television, and national distribution instantly, the value of copyrighted works have diminished sooner. Yet, the copyright duration has increased. Why?? The answer is simple: the copyright cartel realizes the importance of control. If you can keep older music, books, movies, records, etc. from the public, you can force them to pay more for newer ones. In addition, if demand warrants it, you can also with the same control, then demand them to pay the same increased price for the older ones. This obviously does not benefit society. The term of copyright must be shortened, not lengthened.

The term of copyright should be for only 25 years, with an additional remuity period of 25 years. This renewable period should only be renewable personally by an author, writer, or performer. No copyright registered to any corporation should be able to be renewed. Such renewables never really help the intended author, but merely enable them to maintain their control. The loss of this control might bring competition which cannot be tolerated by the copyright cartel. Such fear of loss of control can be proved by the enormous efforts that have been made to extend the life of expiring copyrights of 1909-1919. Because of the extension of these copyrights, the public has been denied access to over 100,000 copyrights which should now be in public domain.

We sincerely hope that you will consider shortening the period of copyright. We are afraid that from life +50 years, they will have it increased to life +100

years, then life +150 years and so on.

Finally, our last request is that you must eliminate the copyright royalty on cable television. T.V. and radio have always been free to the public. Why should people, who just because of their location, be forced to pay a tax on their T.V. viewing? There will be no benefit to the public derived from cable T.V. royalties. Only the copyright cartel will benefit. The public will pay! Consider what the added cost might be to the consumer in dollars and cents. Not only with the present rates, but the rates in the future as they might be raised (without the necessity of Congress' will) by the copyright tribunal. This cost might drive people away from cable T.V., thus possibly depriving their children of educational shows unavailable in their local areas. If just one child in America is deprived of this modern miracle, in order that a few corporations may profit, the cost would be unbearable. Your vote for cable T.V. copyrights will mean that some children might be denied an equal chance of education because of their parent's income.

We have enclosed additional information and charts which should dramatize our points. Thank you for considering our ideas.

Respectfully yours,

GLORIA J. NARE, Chairman.

COUNCIL OF AFL-CIO UNIONS FOR PROFESSIONAL EMPLOYEES, Washington, D.C., October 31, 1975.

Hon. Robert W. Kastenmeier, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: This Council, which comprises 20 national unions representing more than one million men and women engaged in various professions, is deeply interested in the Judiciary Committee's efforts to revise our nation's copyright laws,

Revision is long overdue. Major changes in technology have rendered present law obsolete in many instances, and, in some cases, harmful to the goal of pro-

moting the arts and sciences which was set forth in our Constitution.

We are greatly concerned that H.R. 2223; the revision bill that is now before your committee, fails to consider technological changes that have drastically affected the performing arts professions and have threatened the economic environment of the performing artist.

The writer and composer, under present law, are protected from those who would unscrupulously take their work, convert it to their own use and exploit it for profit. But the performer whose work is "imprinted" on a sound recording is given no such consideration. The recorded artistry of the American performer has become the basic staple of programming by commercial radio stations, background music services and jukebox operators. And yet, no money is paid by these exploiters to the performing artists who made all of this recorded programming possible.

The overwhelming majority of these creative, highly skilled performers are unknown to the general public and do not even enjoy a moderate income from their professions. They are the nameless musicians that comprise America's symphony orchestras; they are the faceless voices that accompany the well known stars; they are the instrumentalists who make possible the special sounds that make American popular music so popular around the world. They pursue occupations as singers, musicians and actors that are among the lowest paid and most highly unemployed in our country. The Congress has recognized this fact and has devised grant programs to aid people in these arts occupations. In light of this, it is difficult to understand why the Congress would want to continue protecting the multi-billion dollar broadcast industry from the necessity of paying these people for the profitable use of their work.

H.R. 2223, as it now stands, would protect .. writer from those who would exploit his published work; it would protect the imposer in a similar manner. It would insure that the broadcasters receive payment from cable operators who convert over-the-air broadcasts to their own use and pro. . It would protect the publisher from the indiscriminant photocopying or Xeroxing of publications. But it would do nothing to provide America's performers with the right to collect even the smallest amount of remuneration from the exploitation of their recorded.

performances.

This Council considers this to be a fatal omission and, unless corrected, a serious subversion of the quest for true copyright reform. Along with the AFL-CIO we have urged your Committee to correct this oversight. Unless appropriate recognition is accorded the artists who create sound recordings by inclusion of a performance royalty, this Council cannot, in good conscience, support H.R. 2223.

Nearly every major country of the western world recognizes the creativity inherent in a performance and the need to provide performing artists with some compensation for the commercial use of their recorded performances. It is time the U.S. brought its laws up to date and in step with the rest of the modern world.

We are aware, of course, that some have expressed concern that broadcaster opposition to payment of performance royalties might slow passage of copyright revision legislation. Some legislators have even expressed fear of broadcaster

These fears should be viewed in perspective.

The broadcasters have a variety of other legislative objectives in this Congress and in the copyright legislation before you. Indeed, they rightfully are seeking royalty payments to themselves when their programs are picked up and retransmitted for profit by cable operators. H.R. 2223 grants them such a royalty. We respectfully suggest that if royalties are to be paid to broadcasters by cable operators under such conditions then they should also be paid by the broadcasters when they "pick up" and exploit recorded programs created by recording companies and artists not employed by the broadcaster. The principle is the same. Those who use another's creative work for profit should help sustain and encourage the creator by payment of some remuneration.

At present, the American recording industry and the many fine artists it employs are supported by the average purchaser of records from the local record store. The massive broadcasting jukebox and background music industries contribute almost nothing to sustain and encourage this creative source. This, we contend, is unjust to the artists and forces an unfair burden on the record con-

Fortunately, H.R. 5345, authored by Representative Danielson and co-sponsored by 20 other members of the House, offers the desired copyright protection and encouragement for the performer.

We suggest that the provisions of this bill be made a part of any legislation that would seek to qualify as a serious modernization and reform of our copyright

laws.

The principles embodied in these provisions are endorsed by the National Endownent for the Arts, the AFI-CIO, the Recording Industry Association of America, the Section on Patent, Trademark and Copyright Law of the American Bar Association, the U.S. Register of Copyrights, the Associated Councils of the Arts, which comprises the various state and local arts councils, and numerous artists and authorities on America's performing arts.

We respectfully urge that you use your good offices to insure that the needs of America's performing arts and artists are given their rightful place in any

revision of the nation's law governing copyright that your committee may propose.

We look forward to learning your views on this most serious matter.

Sincerely yours,

JACK GOLODNER, Executive Secretary.

P.S.—The enclosures should answer any questions concerning performance royalty and this Council. If not, we would be happy to respond to any queries from your office.

J. G.

LIST OF OFFICERS

COUNCIL OF AFL-CIO UNIONS FOR PROFESSIONAL EMPLOYEES

President: Albert Shanker, President. American Federation of Teachers. General vice president: Hal C. Davis, President, American Federation of Musicians.

Treasurer: Rodney Bower, President, International Federation of Professional and Technical Engineers.

AFFILIATES OF THE COUNCIL OF AFL-CIO UNIONS FOR PROFESSIONAL EMPLOYERS

Actors Equity Association.

American Federation of Musicians.

American Federation of Teachers.

American Federation of Television and Radio Artists.

American Guild of Musical Artists.

Brotherhood of Railway, Airline and S

Brotherhood of Railway, Airline and Steamship Clerks.

Communications Workers of America. Insurance Workers International Union.

International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators.

International Brotherhood of Electrical Workers.

International Federation of Professional and Technical Engineers.

International Union of Electrical, Radio and Machine Workers.

International Union of Operating Engineers.

National Association of Broadcast Employees and Technicians.

Oil, Chemical and Atomic Workers International Union.

Office and Professional Employees International Union.

Retail Clerks International Association.

Seafarers International Union.

Service Employees International Union.

Screen Actors Guild.

PERFORMANCE ROYALTY LEGISLATION

Not many years ago, radio stations and the radio networks were excellent sources of employment for America's performing artists. Networks had their own orchestras. Local stations gave local talent job opportunities.

Today, the networks and the stations use recorded music instead of live musicians and suggests. On the average, 75% of all commercial radio program-

ming is devoted to recorded music.

Every time a recording is played over the air, the composer and the publisher of the music get paid because present copyright law requires that the users of their work pay a performance royalty. Unfortunately, the artists who bring the composer's music to life and add their individual interpretation that often makes the difference between a "hit" and a "flop", get no such royalty. Nor does the recording company which, like the publisher of a book, produces and manufactures the work. Like the composers and the publishers, these artists and producers can only receive such royalties if copyright law provides for it.

For this reason legislation has been introduced in this Congress that would

For this reason legislation has been introduced in this Congress that would require those who use sound recordings for their profit to compensate performers and record companies by the payment of royalties. Half of the royalties would go to the performing artists and half to the recording companies. All of the performers would share in their half equally so that the mass of recording artists who are largely unknown instrumentalists and accompanying vocalists.

will receive meaningful compensation.

The performance royalty principle embodied in this legislation is strongly supported by the National Endowment for the Arts, the U.S. Register of Copyright, the AFL-CIO, the Recording Industry Association of America, the American Federation of Musicians, the American Federation of Television and Radio Artists, Actors Equity Association, the Associated Councils of the Arts (which comprises the State and community arts councils), the Section on Patent, Trademark and Copyright Law of the American Bar Association and the Council of AFL-CIO Unions for Professional Employees.

Senator Hugh Scott, a primary sponsor of this legislation in the Senate, summed up the raison d'eure for the measure when he said, "The real issue to me is whether or not a person who uses his creative talents to produce music should be entitled to compensation from someone who takes the music and makes a produce that the same of the same o

from it".

Supporters of this legislation believe it is unfair that an individual organization or industry can lawfully take the creative work of others and without compensating them, exploit that work for their own gain. Artists and recording companies make records for the enjoyment of the general public—not to make profits for commercial broadcasters. But, under present law, it is the average citizen who purchases a record from the store who supports the many artists and re-ording companies that provide us with the bulk of our music. The broadcasters and others contribute relatively little.

The broadcasters allege that they do contribute by popularizing particular recordings. But who is to say whether the use of recordings by Elton John or the Boston Symphony is benefitting the artists popularity or that of the broadcast station: It is a common practice of many stations to ascertain from local stores what records are selling well and then play them in order to attract more listeners. Obviously, their purpose is not to popularize a record or an artist but rather to ride the coattails of already popular recordings in hopes that their use will improve the stations' audience and justify high advertising rates.

It is now possible for people to tape recorded music off the air. As this practice becomes more prevalent, the use of recordings by broadcasters could

actually curtail record sales.

The myth that broadcasters are assisting America's artists and record companies is just that—a myth. There are other fantasies being conjured by opponents of performance royalty legislation. Primarily, they relate to the constitutionality of the proposed legislation and its economic impact on the broadcast industry. We think the following dispels these myths:

- I. There Can Be No "Constitutional Doubt" That the Production of a Sound Recording Is a Creative Activity Deserving of Copyright Protection.
- 1. Copyright Protection Covers Wide Variety of Creative or Intellectual Efforts.—Copyright protection has never been limited to the "Writings" of "Authors" in the literal words of the Constitution. To the contrary, Congress has granted a copyright to a wide variety of works embodying creative or intellectual effort, including such "Writings" as musical compositions, maps, works of art, drawings or plastic works of a scientific or technical character, photographs, motion pictures, printed and pictorial illustrations, merchandise labels, and so on.
- 2. Constitutionality of Copyright for Sound Recordings Upheld.—Both Congress and the Courts have recognized that sound recordings may be granted copyright protection under the Constitution. In the Anti-piracy Act of 1971, where Congress conferred limited copyright protection upon sound recordings, the Senate Judiciary Committee concluded that "sound recordings are clearly within the scope of 'writings of an author' capable of protection under the Constitution." S. Rep. No. 92–72, 92d Cong., 1st Sess., pp. 4–5. The Committee rejected the constitutional objection once again only last year. S. Rep. No. 93–983, 93d Cong., 2d Sess., pp. 139–40.

 The Courts have expressly upheld the constitutionality of legislation ac-

The Courts have expressly upheld the constitutionality of legislation according copyright protection to sound recordings. In Capitol Records, Inv. v. Mercury Records Corp., 221 F.2d 656, 657 (2d Cir. 1955), the Court said that "there can be no doubt that, under the Constitution, Congress could give to one who performs a . . . musical composition the exclusive right to make and vend

phonograph records of that rendition."

In Shaab v. Kliendienst, 345 F. Supp. 589, 590 (D.D.C. 1972), a three-judge federal Court likewise concluded that the activities of sound recording firms "satisfy the requirements of authorship found in the copyright clause..." The United States Supreme Court, too, has indicated that the copyright clause can

extend to "recordings of artistic performances." Goldstein v. California, 412 U.S. 546, 562 (1973).

Finally, the Copyright Office has advised that it is within Congress' consti-

tutional power to grant copyright protection to sound recordings.

3. Creativity in Production of Sound Recording.—Performers and record companies engage in creative activity when they use their artistic skills, talents, instruments and engineering to produce and record a unique arrangement and performance of a musical composition. The Senate Judiciary Committee has found creative copyrightable elements in the "performer whose performance is captured and . . . the record producer responsible for setting up the recording session and electronically processing the sound and compiling and editing them to make the final sound recording." S. Rep. No. 92-72, 92d Cong., 1st Sess., pp. 4-5.

II. Equitable and Economic Factors Overwhelmingly "Support a Performance Right for Sound Recordings.

1. Sound Recordings Account for Three-Fourths of Radio Programming.—The basic staple of radio programming is recorded music. The Senate Judiciary Committee has determined that 75 percent of commercially available time is used to play sound recordings. Thus, recorded music accounts for roughly three-quarters of stations' advertising revenues—or about \$900 million annually. Yet broadcasters—who must pay for all their other types of programming—pay nothing to performers or record companies for the prime programming material they use to secure their audiences, revenues and equity values."

they use to secure their audiences, revenues and equity values.

2. Recordings Have Replaced "Live" Performances.—Broadcasters used to pay for "live" performers, but these artists have actually been replaced by their own recordings. It is inequitable for these recorded performances to be broad-

cast for profit without any payment being made to the performers.

3. Composers and Publishers Receive Performance Royaltics.—Under the existing Copyright Law, broadcasters pay the composer and publisher of the song that is played over the air in a sound recording. But the performers and record company whose artistry and skill brought that composition to life in a recorded performance, and whose creative contribution is at least equal to, if not greater than, that of the composer, are paid nothing.

4. No "Frec Ride" for Record Companies.—The record companies do not get a "free ride" from broadcasters. Record companies purchase over \$32 million of advertising time from radio stations annually—about three times the total projected performance royalties under the bill. Further, almost two-thirds of the records played are "oldies" that enjoy few current sales, if any. Record companies and performers derive little benefit from such airplay, but these recorded performances draw massive listening audiences for broadcasters and, in turn, advertising revenues for the stations.

5. Broadcasting Industry Very Profitable.—The broadcasting industry is exceedingly healthy. Between 1967 and 1973 (the last year for which data are available), the pre-tax profits of radio stations rose 39 percent, and advertising

revenues rose 61 percent.1

6. Royalty Fees Are Very Modest.—The proposed performance royalty fee is not burdensome. About one-third of the nation's radio stations would pay 65¢ per day. Another third would pay \$2.05 per day. The remaining third of the stations—large stations with more than \$200,000 in annual advertising revenues—would make a modest payment of one percent of net advertising revenues. Thus, even a station earning revenues of \$1 million annually would pay only \$27.40 daily, or \$1.14 per hour to compensate the performers, musicians and record companies for the exploitation of their creative efforts. Clearly, the performance royalties are fair and reasonable, particularly in light of the immense advertising revenues that recorded music produces.

The rate schedule is as follows:

Revenues	Annual Fee
	1 percent of net advertising revenues.
\$100,000—\$200,000	
\$25,000—\$100,000	\$250.00.
\$25,000 and under	None:

Further, all-news stations or others which do not rely heavily on recorded music would pay only a pro rata share of the performance royalty percentage.

¹ See attached article from Broadcasting Magazine for more recent data.

7. Performance Royalty Consistent with Cable TV Royalties.—The principle underlying the bill is identical to that supported by the broadcasters in the general revision bill. Broadcasters assert that cable systems should be required to pay the broadcaster and copyright owners when cable TV picks up the broadcasters' over-the-air signal. In directly parallel fashion, broadcasters should be required to pay the creators of sound recordings when broadcasters use that programming material for their profit.

8 Performance Royalty Recognized Abroad.—The principle of the bill is not at all radical. Almost all other Western nations require the payment of performance royalties to performers and recording companies. Some of these foreign payments are currently denied to U.S. artists and companies because our country offers no reciprocal right. The primary reason that the principle has not been established here is that the last revision of the copyright laws took place in 1909, long before sound recordings became a significant source of programming ma-

terial for commercial exploitation by broadcasters and others.

[From Broadcasting, Sept. 1, 1975.] RADIO 1975: BIGGEST YEAR IN THE MAKING

National radio business has taken off this year as in no other of recent memory. The radio networks are virtually sold out in key day parts and seem certain to make this their best sales year in more than two decades—collectively almost for sure, and in some cases individually.

National spot radio is more erratic but according to most accounts is running ahead of last year's pace by at least two or three percentage points and perhaps

by several—either way, by enough to make a record.

The status of local business is less clear. In some markets it's ahead of 1974 levels and in some it's behind, depending on several factors including the aggressiveness of local sales staffs and the extent of the recession's local impact. Generally, observers tend to think 1975 local sales will rise in total-which would mean another new record there, too—but that the old pattern of almost automatic annual 6%-8% increases will not hold up in some markets.

Network business, where much of the excitement used to be in pretelevision days, has of course dwindled to small potatoes by comparison with national spot and local. In 1973, the latest year for which FCC figures are available for all three components, network billings totaled \$59.4 million, national spot came

to \$382.8 million and local reached \$1.2 billion.

But although network is now the smallest component of radio business, lately it has become the liveliest. "Super," one network head said last week. "Unbelievable," said another. Both were talking about sales this year. Some talked of being almost sold out for long periods of the day. Others, though obviously clated avoided the "sold-out" term as a matter of principle—or of supersition: As one put it, "There's always a spot at 2 o'clock in the morning-or some timethat you can sell to someone out there."

The best estimates available suggest that for the first seven months of 1975 national network sales in total—for ABC Radio's four networks and the CBS, Mutual and NBC Radio networks—exceeded the comparable 1974 periods by somewhere between 20% and 30%. Looking at it another way, C. Edward Little, president of Mutual, estimated that if total network billings merely match 1974 monthly totals for the rest of 1975, the year will still come out 12%-15% ahead of last year.

Nobody apparently expects the rest of 1975 to fall back and merely keep stride with the last half of 1974. Even if it did, authorities figure network radio would still have its best year since 1972, one of the best network radio years in recent history. And if gains maintain anything approaching the 20%-30% upside rate of the first seven months, 1975 should be network radio's best since 1954, when FCC put network billings at \$78.9 million. That, incidentally, is more than double what they were in the bottoming-out years of 1959-60.

While the radio networks agree their business is on the upswing, station reps and other sales officials offer differing assessments of spot radio sales. Mostly they say sales are up, but they disagree as to how much. "The business is just pouring in," according to the head of one major-market station group. A station rep with both large and middle-sized markets on his list

² H.R. 5345.

estimated his 1975 sales were up 27% as of Sept. 1 but said much of that gain was in larger markets. He also said spot sales "went into a funk a couple

of weeks ago" but that he assumed they would perk up.

Another leading rep with both large and medium-sized markets reported. his business up "but not booming," and thought he would wind up about 3% ahead of 1974—thanks more to regional and rep-network business, he said, than to gains from strictly national accounts. He, too, agreed business was better for large markets than for small. "Some of the guys in small markets are getting killed," another said.

Still other sources estimated that spot business for the first half was 6% to 8% ahead of the 1974 first half—which wasn't great in the opening months but strengthened in April, May and June. Thus, some sources' estimates of 10% to 12% gains this past June were interpreted as reflecting solid midyear strength this year, though some reps challenged the 10%-12% estimate for

June gains.

What the reps did not disagree on was the resurgence in network radiobusiness. "It's fantastic," said one rep, using the sort of adjectives network

officials themselves are using.

"Sensational" was ABC Radio President Harold L. Neal Jr.'s word. "We're going to have a good year," he said, crediting all divisions—AM, FM and the four ABC Radio networks—with contributing to that result. Edward F. Mc-Laughlin, president of the ABC Radio Network, said this year's fourth quarter will be the fifth consecutive record quarter for the network, and that "we're looking for 1976 to outperform 1975." Commercial availabilities, according to Mr. Neal, "are very, very tight" on all four ABC Radio networks. Sam Cook Digges, president of CBS Radio, predicted 1975 would be the best for his division since 1970—when, he noted, not only did broadcasters still' have diggerate advertising but the CBS Radio network also had a faith of Castley.

have cigarette advertising but the CBS Radio network also had Arthur Godfrey Show, an exceptionally heavily sold daily program. George J. Arkedis, vice president and general manager of the CBS Radio network, reported—with obvious pleasure—that time was running out: "Advertiser investment on the CBS Radio network has almost exhausted our commercial inventory from 6 a.m. to 6 p.m. during all of August and September," he asserted.

Mutual Broadcasting System's President Little said 1974 was "the biggest calendar year Mutual has had since the beginning of television, the best since around 1949"—and that sales this year will exceed 1974's by close to 40%. That growth, he said, will reflect sales gains both for Mutual, which with 679" affiliates bills itself as the world's largest network, and for its subsidiary Mutual

Black Network, with 97 affiliates.

Jack G. Thayer, president of NBC Radio, said the NBC Radio network's sales this year will rival those of 1972, a high spot in recent history. "We're ahead of budget," he added. Ms. Marion Stephenson, vice president and general manager of the radio network, called 1975 "one of our better sales years."

Mr. Thayer and colleagues have been in the throes of getting a second network.

work—the NBC News Information Service—off and running, which presumably has diverted some concentration and caused some dislocation in the sales efforts of NBC-owned stations and converted to the all-news service. Business at those stations, he said, is "fair, not sensational," but improving. As for sales on the all-news NIS network, Mr. Thayer said, "We're gearing up for an Oct. 1 start on selling." Since NIS started last June 18. he said, "we've had some business but it's been the over-the-transom type" as officials have concentrated on "getting the product in shape." He said the service currently has 55 stations signed, with 48 of them already on line.

The 1975 upsurge in radio business is credited to a variety of factors, and in fact some officials think it harder to explain why business hasn't been booming

all along.

Among the more commonly cited comeback causes are growing use by refail accounts at both national and local levels, plus the instant measurability of sales results by retail accounts; increasing availability of co-op funds and stepped-up efforts to make co-op an ever larger source of radio dollars, and both long-term and short-term sales development work by networks, reps, individual broadcasters and trade associations. As summarized by ABC Radio's Mr. Neal, who also is chairman of the Rudio Advertising Bureau, "a lot of things are paying off at the same time."

The recession also gets a share of the credit. Advertisers' preoccupation with economy and more insistent demands for media values led many into-

radio for the first time or on a heavier scale than before (for a partial list of "new" advertisers, see page 22). To advance this trend, radio's special values during hard times were promoted widely in a "Radio: Adflation Fighter" on-air campaign, led by RAB, which at its peak earlier this year was on an estimated 2,000 radio stations—and which now, as the recession shows signs of fading, is being recast to emphasize the continued importance of the "ad-flation fighter" in reaching consumers as the economy turns around.

"In any case," said ABC Radio's Mr. Neal, "there's a lot of momentum going now. I just hope it continues in 1976—and I think it will; we're predicting it will."

Almost everyone is.

BEHIND THE BOOM

Success in signing up advertisers they hadn't had before is part of the radio networks' 1975 boom. In the lists that follow, each network enumerated advertisers that were new to it in 1975, "new" in each case meaning advertisers which had not been on that particular network in the past two to three years.

ABC Radio.—AMF luc.'s Harley-Davidson metorcycles; Allstate insurance; Ajay sporting goods; American Home Products; Denorex shampoo; Banfi Wines Corp's Riunite wines; Chattem Drug & Chemical's Sun in Hair Lightener; Chesebrough-Ponds' Hemorraid, Bath 'n' Splash, Bath Oil Beads and other products; Del Monte green beans; Duraflame fireplace log; Discwasher record cleaner; General Electric small appliances; Georgic-Pacific building products; Jimmy Dean Meat Co.; Michelin Tire Corp.; National Potato Promotion Board; Departs of the Popular of Papares Corporate Corporate Research Philadura's Figuriana, Schooler's Pennzoil's Penreco Gumout carburetor cleaner; Pi'lsbury's Figurines; Schenley's Stock vermouth; Schick razors; Scott lawn products; Sears' men's jeans, lawn-mowers, shirts and slacks; Singer sewing machines; Standard Brands' Curtiss B. by Ruth and Butterfingers candy and Planters peanuts; Volkswagen Rabbit; Warner-Lambert's Dynamints, Rolaids and Cool-Ray sun glasses; Yamaha International Corp.'s stereo/hi fi and guitars; Yardley of London cosmetics and fragrances.

CBS Radio.—Allis-Chalmers Corp; Allstate Insurance; AT&T; Borden's Kava coffee; British Leyland Motors; Certain-Teed Products Corp.; Control Data Corp.; Jimmy Dean Meats; A.B. Dick Co.; Emery Air Freight; Fedders Corp.; General Foods' Sanka; John Hancock insurance; Heublein Co.; S.S. Kresge's K-Mart stores; Michelin tires; Midas International Corp.; National BankAmericard; National Pork Producers Council; Jean Patou Inc.; Red Wing Shoe Co.; Rich Products Inc.; Scott lawn products; Sichel Blue Nun Wine Co.; Standard Brands' Planters peanuts; Western Union; Warner-Lambert's Rolaids.

Mutual.—Ace Hardware; Anheuser-Busch's Michelob beer; Armour-Dial's

Armour hot dogs and Dial soap; American Home Products' Denorex shampoo, Quiet World and Dristan; Ballantine Books; Borden's Kava coffee; Conwood Corp.; Chesebrough-Ponds; Dodge cars; Florida Citrus Commission; General Electric; Goodyear Tire & Rubber; Creyhound package express; John Hancock insurance; K-Mart stores; Kellry-Splingfield tires; La Choy Foods; Life Savers Inc.; Menley James' ARM allergy relief medicine; Penneda James Tourist Country motols. Penneda James motols. School of the Country motols. cleaner; Pillsbury Co.; Quality Courts motels; Ramada Inns motels; Schenley's Dubonnet and Mateus wines; Scott lawn products; Singer sewing machines; Standard Brands' Planters peanuts; Sterling Drug's new Bayer aspirin products and its Lehn & Fink division's Wet Ones towelettes; Warner-Lambert's Rolaids, Dynamints and American Chicle products; Western Union Mailgrams; Winnebago campers.

NBC Radio.—Allis-Chalmers Corp.; American Laundry Machinery; Bekins moving and storage; British Leyland Motors; Certain-Teed Products Corp.; A.B. Dick Co.; Eaton Corp.; Exxon; Ford Tractor; Fedders central air conditioning; Hartz Mountain pet products; Jimmy Dean meats; S.S. Kresge Co.; Michelin tires; Midas Mufflers; Miles One-a-Day vitamins; Macklenburg-Duncan hardware group; National Bowling Council; Oxford Industries apparel; Penr.zoil's Gumout carburetor cleaner; Scott lawn products; Sears lawnmowers; Western Union;

Winnebago Industries.

WHAT'S PAST

Regardless of the shape in which radio finishes 1975, 1974 was a pretty good year for radio stations. According to the National Association of Broadcasters, in figures released last week, the "typical" radio station (both AM's and FM's) reported a 7.6% increase in revenues for 1974 over 1973. For the "typical" FM station, the revenue increase was nearly three times that figure \$22.2%. But the same FM operation was operating at a net loss of \$2,200 in 1974. That was a \$3,100 improvement over 1973's performance, and NAB says the upward trend could mean that in 1975, the typical FM could break even for the first time. Profits for the typical radio station were up 4.1% over 1973, although the NAB noted that the typical stations profit margin was 5.4%, continuing a decline for that category begun in 1969. The AM-FM figures were derived from 1,754 responses to an annual questionnaire; the FM-only data came from 320 stations. The complete figures:

	Typical radio station			Typical fM's 1.ly		
	1974	1973	Percent change	1974	1973	Percent change
Total time sales	\$187;100	\$175, 100	6.9	\$124,700	\$101,600	27.
From: Network compensation National and regional spot Local advertising	0 18,300 168,800	0 18, 200 156, 900	.5 7.6	0 5,600 119,100	4,700 96,900	0 19.1 22.9
Total broadcast revenue	184, 300 174, 300	171, 300 161, 700	7.6 7.8	122, 300 124, 500	100; 100 105, 400	22.2 18.1
From: Technical Program Selling General and administrative	12, 700 51, 900 35, 100 74, 600	12, 100 48, 000 30, 700 70, 900	5. 0 8. 1 14. 3 5. 2	9, 300 38, 000 28, 800 48, 400	8,700 32,500 21,400 42,800	6.9 16.9 34.6 13.1
Profit (before Federal tax)	10,000	9,600	4.1	(2,200)	(5, 300)	
Profit margin (percent)	5.42	5.58	3	(1.83)	(5, 25)	
Selected expense items: Total salaries	\$92,000 4,400 9,400 5,400	\$85,200 3,900 8,400 4,700	8.0 12.8 11.9 14.9	\$60,400 3,300 10,000 2,700	\$50,200 1,300 9,200 1,900	20. 3 153. 8 8. 7 42. 1

MAGAZINE PUBLISHERS ASSOCIATION, INC., New York, N.Y., October 31, 1975.

Re Copyright Law Revision—H.R. 2223. Hon. Peter W. Rodino, Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RODINO: The Magazine Publishers Association, Inc. (MPA) wishes to avail itself of the opportunity to submit a written statement presenting its views and suggestions with respect to the above Copyright Law Revision Bill—H.R. 2223 which is now under consideration by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

MPA is a national trade association founded in 1919. It is composed of more than 125 individual companies which publish more than 450 periodicals appearing in varying degrees of frequency, such as on a monthly, bi-monthly, weekly, or bi-weekly basis. In virtually all instances these periodicals are statutorily copyrighted and are distributed nationally throughout the United States. More than 3 billion copies of periodicals published by MPA member companies are sold annually.

The interests of the MPA and its publisher members are inextricably bound with matters affecting rights, including copyrights, in literary material. Representatives of MPA have previously appeared before the Committee in person and have submitted position statements at various stages of the Copyright Revision Legislation.

The MPA through the instrumentality of its Legal Affairs Committee has studied and is prepared to comment on certain of the provisions of the Revision "insofar as they either relate to or affect periodicals." Other important parts of the Revision not relating to periodicals, such as the provisions relating to musical works, motion pictures, sound recordings, cable television etc. will not be covered in this statement.

Sec. 106 sets forth the five fundamental rights that the Revision gives to the copyright owners: the exclusive rights of (1) reproduction, (2) adaptation, (3)

publication, (4) performance, and (5) display, which together constitute the so-called "bundle of Rights". The next eleven Sections provide various limitations and the section of the sec

tions, qualifications, and exemptions of these rights.

Sec. 107 gives the judicial doctrine of "fair use" statutory recognition for the first time. Rather than attempting a definition of "fair use", this Section makes specific mention of four factors—(1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work-to-be included in the factors to be considered in judicial determinations.

Sec. 108 deals with the question of reproduction by libraries and archives. It authorizes the making of one copy "of no more than one article or other contribution to a copyrighted collection or periodical issue, ar . . . of a small part of any other copyrighted work". There are restrictions against the making of multiple copies and a specific restriction in Sec. 108 (g) (2) against the "systematic reproduction or distribution of single or multiple copies" of copyrighted

material by any library or archives or its employee.

Sections 107 and 108 must be read in the light of the decision in the Williams & Wilkins case in which the Supreme Court of the United States in the four to four decision affirmed the decision of the Court below that the unauthorized photocopying of copyrighted medical journals by two government libraries did not constitute copyright infringement on the ground that such copying constituted "fair use". The language of Sec. 108, standing alone, would seem to prohibit copying of the nature and scope indulged in by the government in Williams & Wilkins. However, Sec. 108 (f) (3) provides that nothing contained in that Section "in any way affects the right of fair use as provided by Sec. 107". It would appear therefore, that, notwithstanding the language of Sec. 108, an attempt could be made to justify multiple copying of the nature and scope present in the Williams & Wilkins case or of even greater magnitude under the application of the provisions of Sec. 107 with respect to "fair use". Such a result would distort the statutory scheme and nullify, by indirection, the carefully drawn provisions of Sec. 108.

The MPA—along with book publishers and others prominent in the communication industry—is opposed to the significant erosion of Constitutional and Congressional intent represented by the unrestricted copying permitted in the Williams & Wilkins case and wishes to foreclose any possibility that such copying could be justified under the provisions of Sec. 107, without reference to Sec. 108. Accordingly, the MPA recommends that Sec. 107 be amended by adding thereto a sentence stating in words or in substance that the making of more than one copy of all or substantially all of a copyrighted work or of any article or other contribution to a copyrighted collection or periodical issue shall in no event be considered a "fair use" thereof.

Sec. 702 of the Revision provides that the Register of Copyright is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made his responsibility under this title, and further provides that all such regulations established by the Register are subject to the approval of the Librarian of Congress. Other Sections of the Revision confirm the intent of the Bill to enlarge not only the administrative responsibility but also the quasi-legislative authority of the Copyright Office in the entire area of statutory copyright protection.

The present Register of Copyrights has adopted the laudal e practice of publishing proposed changes in regulations in the Federal Register and requesting comments and suggestions from all parties concerned. The Register has also on one occasion held public hearings on proposed changes in regulations. The MPA feels that the Register of Copyrights is to be commended on affording interested parties the right to be heard on proposed changes in the regulations, and would like to insure that such practice is continued in the future. There is, however, no statutory provision requiring that the Register publish for comment or hold public hearings on any changes in or additions to regulations, and there is no assurance that future Registers of Copyright would follow the precedents set by the present Register in this regard. The MPA believes that this procedural protection is necessary and desirable addition to, and should not be omitted from, this Legislation.

Accordingly, the MPA recommends that, to the extent not covered by existing statutes, the adoption or amending of matters of substance in the rules and reg-

ulations of the Copyright Office be accompanied by advance public notice and publication of the proposed rules or regulations, and that a procedure for public hearings and/or comment on such proposed rules or regulations be instituted.

The above comments and recommendations of the MPA with respect to the Revision shall not be deemed to preclude the MPA or any of its members from

making other or additional comments and recommendations.

If further elaboration of any of the above comments and recommendations is required by or would be of assistance to the Subcommittee, the officers of the MPA and members of its Legal Affairs Committee will be at your service.

Respectfully submitted.

STEPHEN E. KELLY, President.

Cox, Langford & Brown, Washington, D.C., November 5, 1975.

Mr. HERBERT FUCHS,

Counsel to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR MR. FUCHS: Pursuant to our telephone conversation of yesterday afternoon, I am enclosing a copy of a letter sent by Captain John O. Coppedge to Chairman Kastenmeier concerning recent developments relating to the question of the cable carriage of sports events. As you will recall, Captain Coppedge is the Chairman of the NCAA's Cable Television Subcommittee and testified on the Association's behalf before the Subcommittee earlier this year. I would appreciate your including this letter in the record of the hearings on the Copyright Revision Bill if you feel that that action is appropriate. We would be happy to discuss this matter with you or other members of the Committee staff and to provide any information or other assistance that you may feel desirable.

Sincerely yours,

EDWARD W. SAUER.

Enclosure.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Mission, Kans., October 28, 1975.

Congressman Robert Kastenmeier, House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: You are doubtless aware that on July 27 the Federal Communications Commission issued its Report and Order in the proceeding regarding regulation of cable television system carriage of television broadcasts of sports events (FCC Docket No. 19417), and that the meager result of its three-year consideration of the issues was a rule imposing a limitation on cable carriage of events into the immediate area where they are being played, when a local television blackout is in effect.

I am writing this letter in my capacity as chairman of the Cable Television Subcommittee of the National Collegiate Athletic Association, because the Commission's action conclusively demonstrates the pressing need for the Congress to act with regard to the issue of cable carriage of sports events. Because it will provide for secondary transmissions by cable systems of television broadcasts, including sports event broadcasts, the Copyright Law Revision Bill (H.R. 2223), on which we understand your Subcommittee will soon begin markup sessions, is clearly the appropriate vehicle for such action. The need for adoption of provisions in H.R. 2223 which protect colleges and high schools from the impact of cable carriage of certain sports events was fully documented in the NCAA's testimony before your Subcommittee on June 12. Subsequent developments, including the FCC's action and the occurence of still more examples of college games which could not be telecast because of widespread cable carriage into distant communities, provide still further confirmation of the points which we sought on that occasion to bring to the Subcommittee's attention.

The regulation issued by the FCC is completely unresponsive to the concerns expressed by the high schools and colleges. The FCC's rule accords a protection from cable carriage which, although it has application in the context of the telecasting practices of professional sports clubs, is basically irrelevant so far as the colleges are concerned. It does nothing about cable carriage of professional football telecasts into areas where because of the damage imposed on local high

school and college games, broadcasts of the game would not be allowed under Section 3 of the Public Law 87-331. It also does nothing to blunt the threat to the regional and "exception" telecasting of NCAA events—and the consequent impact on the extent of television coverage of college sports—posed by wide-spread cable carriage of such events into areas where television broadcasts are not authorized.

The FCC's new rule became effective on August 22 of this year, and recent events have graphically demonstrated its patent inadequacy in dealing with the concerns of intercollegiate and interscholastic sports. As you will recall, the purpose of the NCAA's Television Plan is to insure maximum television exposure for the largest number of institutions while at the same time preventing these telecasts from having an undue harmful impact upon locally-played high school and college games. An element of flexibility is afforded by provisions under which, in addition to the games appearing nationally or regionally, games of great local interest may be telecast in situations where it can be presumed that no undue impact upon other college games in the vicinity of broadcast will occur.

On September 20 of this year, an "exception" telecast of a football game between Arkansas and Oklahoma State was scheduled to be made in Little Rock, Arkansas. However, it was learned that cable systems planned to carry the game virtually throughout the State of Arkansas, with a potential disastrous effect on concurrently-scheduled local college contests. A similar telecast of a game between Texas Tech and the University of Texas at Austin was scheduled for the following Saturday. Plans to make both of these telecast had to be abandoned because cable systems carrying the pertinent broadcas tations in each case planned to transmit the games into areas where the appearance of the games on television would seriously jeopardize other intercollegiate and interscholastic events. Indeed, the Texas Tech-Austin case, cable systems would have carried the signal to some 65,000 households in areas which are normally drawn upon as an important part of the spectatorship for local college events. The FCC's rule, which was in effect throughout this entire period, was of no avail in preventing this problem.

The inequities in the present system are obvious. Their continuation is in no one's interest. It is not in the interest of the television-viewing public, which will see less, not more, college sports. Indeed, although the recent examples of college telecasts which were precluded by cable carriage illustrate the point, they cannot show the full impact of cable carriage upon amateur sports events, because it is not possible to tabulate all of the potential telecasts that are not even considered due to known widespread cable carriage outside of the broadcast viewing area. Moreover, the present system is not in the long run interest of the cable industry, which will gain at best a transitory advantage and which has never articulated, either in Congressional hearings or in submissions to the FCC, any objection to the protection requested by the NCAA. Nor is it in the interest of the broadcast industry, which is subject to discriminatory treatment. Finally, it is not in the interest of high school and college sports programs, which are struggling to survive.

The failure of the Commission to deal with the issue means that the decision has been placed squarely before Congress, either to perpetuate the present system—and its inequities—by adopting Section 111(c) in its present form, or to amend the bill to include provisions which, in conjunction with the other provisions in the bill governing cable systems, impose reasonable ligitations on secondary transmissions of intercollegiate sports event telecasts and which apply to cable retransmissions the same limitations that are applied by Public Law 87-331 to television broadcasts of professional football games.

We hope that as your Subcommittee tu.ns to revision of H.R. 2223, it will respond to this challenge, and that it will adopt modifications to the secondary transmission authority granted by Section 111 so that the bill will accord colleges and high schools these necessary protections. We will be happy to provide any assistance in this regard which you or the Subcommittee staff may care to suggest.

Sincerely yours,

NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE. Washington, D.C., October 6, 1975.

Mr. HERB FUCHS.

Subcommittee on Courts, Civil Liberties, and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR MR. FUCHS: The National Commission on Libraries and Information Science, at its meeting on September 25, 1975, passed a resolution on the con-

troversial problem of library photocopying.

The resolution, I think, indicates the role that NCLIS has played in cooperation with the Register of Copyrights in trying to develop some compromise between the authors, publishers, and librarians. We are hopeful that the Commission on New Technological Uses of Copyrighted Works (CONTU), which is just being organized, will be able to deal with this problem for the long-range solution.

Sincerely,

ALPHONSE F. TREZZA, Executive Director.

RESOLUTION ON LIBRARY PHOTOCOPYING AND COPYRIGHT

Whereas the problem of resolving the conflict between the expressed need of libraries to share resources via photocopying and the protection of the rights of publishers and authors has so far eluded solution: and

Whereas the Courts and Congress have indicated that the two communities should work together to produce an equitable proposal for dealing with the

problem: and

Whereas the Conference on Resolution of Copyright Issues (which was convened jointly by the National Commission on Libraries and Information Science (NCLIS) and the Copyright Office in the Library of Congress, and which includes representatives of all concerned constituencies) has recommended a study of the volume and patterns of photocopying and of the feasibility of a royalty payment

mechanism; and
Whereas the NCLIS has, in cooperation with the Office of Science Information Services of the National Science Foundation (OSIS/NSF) agreed to fund such

a study to begin approximately 1 January 1976; and

Whereas the newly-established Commission on New Technological Uses of Copyrighted Works (CONTU) is just organizing to begin fulfillment of its mission, the results of which can be expected to have substantial impact on both the understanding of ramifications and the approaches to solution of current and

potential future copyright problems: Now, therefore, be it

Resolved, That the NCLIS suggest to CONTU that it consider requesting the Congress to take only interim action on the photocopying issue in the revision of the copyright law until: (1) the results of the NCLIS study are available; and (2) the CONTU has made its report and recommendations on library photo-

copying.

Adopted by the National Commission on Libraries and Information Science at its meeting on September 25, 1975, in Los Angeles, Calif.

> UNITED STATES CATHOLIC CONFERENCE. DEPARTMENT OF EDUCATION. Washington, D.C., November 14, 1975.

Hon. Robert W. Kastenmeier, Uhairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice. Committee on the Judiciary, House of Representatives, Washington,

DEAR MR. CHARMAN: On behalf of the Department of Education of the U.S. Catholic Conference, I wish to comment of H.R. 2223, "A General Revision of the Copyright Law," which is under consideration by your subcommittee. The i ue of copyright revision is a matter of utmost importance to educators, students, and scholars. The use of reproduced copyrighted materials by educators

and students is a necessary and integral part of the teaching/learning process. As presently written, H.R. 2223 does not adequately provide for the free use of copyrighted materials for nonprofit educational and scholarly purposes. H.R. 2223 could unduly restrict many of the current copying practices in the educational community, expose educators to litigation, and substantially increase the cost of reproducing copyrighted materials for already hardpressed nonpublic schools.

The rights of educators and students to the access to and use of copyrighted materials must be adequately safeguarded and clearly delineated either by incorporating in the statute a limited educational exemption for nonprofit educational and research purposes or by clearly defining in the Committee Report the meaning of "fair use" as it pertains to education.

A limited educational exemption would permit educators and students in nonprofit educational institutions to duplicate a single copy or multiple copies for classroom use of portions of a copyrighted work or a short whole work for non-

profit teaching, scholarship, and research purposes.

In H.R. 2223 there is a provision exempting from copyright restrictions, the "fair use" of copyrighted materials for educational and scholarship purposes. However, the term "fair use" is not adequately defined in the bill itself and should be clearly defined and completely explained in the Committee Report. The Committee Report should incorporate the following concepts:

1. That there be a different standard for nonprofit educational and scholarly uses of copyrighted materials from that applied to commercial uses of such

copyrighted materials:

2. That multiple copies of brief excerpts or short whole works for nonprofit

educational and scholarly purposes is a "fair use" of copyrighted works;

3. That in the application of fair use standards, there should not be a distinction between face to face teaching and mechanical transmissions (e.g., closed circuit television) for nonprofit educational and scholarly purposes.

Besides clearly defining "fair use" the Committee Report should establish the concept that the burden of proof in matters of fair use should legally rest with the copyright proprietor and not on the nonprofit educational or scholarly user.

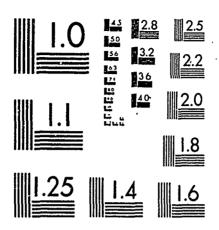
Currently, the burden of proof in matters of fair use rests with the users of copyrighted materials, not with the copyright owner. Meeting this burden is extremely difficult and failure to do so could result in an educator or student being found liable for damages as a copyright infringer. Shifting the burden to the copyright owner places an educator or teacher in a more equitable position than presently exists and places the burden where it logically belongs.

The duration of the copyright period is another concern of the educational community. The current copyright duration period is 28 years plus a renewal period of 28 years. (Statistics from a Copyright Office study show that only 15 percent of all registered copyrights are renewed.) We favor such a short first term copyright, in order that materials which are not renewed at the end of the initial 28 year period and pass into public domain, will become available to educators.

We request that this statement be included in the Record of these Hearings. Thank you.

Respectfully,

REV. MSGR. OLIN J. MURDICK, Secretary for Education.



MICROCOPY RESOLUTION TEST CHART NATIONAL BUREAU OF STANDARDS-1963-A

